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ORDER OUT OF CHAOS: DOMESTIC ENFORCEMENT OF THE LAW OF INTERNAL ARMED CONFLICT

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

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UNITED STATES MARINE CORPS

49TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
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ORDER OUT OF CHAOS: DOMESTIC ENFORCEMENT OF THE LAW OF INTERNAL ARMED CONFLICT

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Order out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict

ABSTRACT: The Law of Internal Armed Conflict, a new international legal regime is emerging from the confluence of the Law of War and Human Rights law. This new regime seeks to apply humanitarian principles to internal armed conflicts while balancing a state's sovereign right to conduct their own domestic affairs. Increasingly criminalized, this regime is seeing growing enforcement by international bodies. This thesis emphasizes the importance of domestic enforcement of this regime to maximize its protection of humanitarian interests.

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I. Introduction

> *It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents.*[1]

States are structured social orders.[2] They serve to bring about the comprehensive coordination of individual energies. For "those affairs which a state cannot deal with exclusively within their own boundaries" there exist international law.[3] International law stabilizes the international system, so that states and individuals can have effective transnational relationships. Similar to the function of any legal system, international law attempts to mitigate to the greatest extent possible the impact of disputes.[4] Where this goal is unattainable, the law seeks the safe "channeling" of disputes, which might otherwise be disruptive and damaging to the international system.[5]

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[1] James Madison, A Memorial and Remonstrance, Address to the General Assembly of the Commonwealth of Virginia (20 June 1785), *at* http://worldpolicy.org/americas/religion/madison-remonstrance.html.

[2] GERHART NIEMEYER, LAW WITHOUT FORCE, THE FUNCTION OF POLITICS IN INTERNATIONAL LAW 313 (1941).

[3] *Id.* at 24.

[4] Karl N. Llewellyn, *The Normative, the legal and the Law jobs: the Problem of Juristic Method*, 49 YALE L.J. 1355, 1376 (1940) (explaining the function of law as to "get enough of it done to leave the group a group").

[5] *Id.* at 1376. Professor Llewellyn also reminds us that "the lines the channeling is to take will in part condition the effectiveness of the channeling." *Id.* at 1383.

This need to mitigate disputes is a valid reason for states to support and abide by international law.[6] By ensuring law abiding behavior in themselves and their citizens, each state, collectively and severally, furthers their interest in providing an environment that maximizes their opportunities.[7] For this reason, "[t]he international legal system is supported not only by states' interests in promoting individual rules, but also by their interest in preserving and promoting the system as a whole."[8] In this way, international law imposes its authority through necessity.[9] So even though individual states or parties within the state may find short-term advantages in violating the law, compliance with the system better serves their long-term interests.[10]

These same policies underlie both the Law of War and Human Rights regimes. Both of these legal regimes seek to minimize the consequences of conflict. The Law of War does so in governing conflicts between states, while Human Rights does so in disputes between states and their citizens. In addition, both regimes recognize the role of the state as the unitary structure of social order by relying on the state as the primary means of implementation. Recently, these two regimes have reached confluent areas.

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[6] HENRY MANNING, THE NATURE OF INTERNATIONAL SOCIETY 106-07 (1962).

[7] Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 532-33 (1993) (discussing the development of universal norms to address global concerns).

[8] *Id.*

[9] GERHART NIEMEYER, LAW WITHOUT FORCE, THE FUNCTION OF POLITICS IN INTERNATIONAL LAW 325 (1941).

[10] Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 532-33 (1993) (discussing the development of universal norms to address global concerns).

These confluences, the humanitarian pressures on the Law of War, the escalation of internal armed conflicts, and the growing recognition of universal fundamental human rights, have all played a part in the development of a new international law regime, the Law of Internal Armed Conflict.[11] This thesis examines the historical roots of this new legal regime, and then examines how this regime has drawn on the experience of the Human Rights traditions for continued growth. With the broad parameters of the Law of Internal Armed Conflict identified in distinct sources of law, a brief look into the future of this regime is warranted.

The future of the Law of Internal Armed Conflict is evident in two trends in international law: first the growing recognition for international humanitarian standards in all armed conflicts, and second the growing criminalization of violations of international humanitarian standards. By linking these trends, many commentators see the possibility of enforcement of minimum humanitarian standards in internal armed conflicts.[12]

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[11] As a descriptive term and title, the author uses the Law of Internal Armed Conflict for this emerging area of law. Other authors have also used this term to speak descriptively about this area of law, although not as a title for a separate and distinct body of law. The term's true origins, perhaps like the term Law of War is mostly irrelevant. The current parameters of this area of law as well as its confluence with Human Rights will be further outlined in the discussion that follows. The author proposes that norms from the Law of War and Human Rights have migrated to internal conflicts via customary and conventional law. These norms consist of the Law of Internal Armed Conflict.

[12] *See Symposium on Method in International Law*, 93 AM. J. INT'L L. 291 (1999) (discussing the application of minimum humanitarian standards using various legal theories such as positivist, policy-oriented and international legal process).

In examining the conduct of internal armed conflicts, a variety of tools have been used, such as truth commissions,[13] amnesty laws,[14] international criminal tribunals,[15] and domestic prosecutions.[16] Some commentators suggest that greater reliance on international institutions paves the way for re-building these torn societies and re-establishing the rule of law.[17] This reflects the growing use of international institutions to examine these internal armed conflicts under either Law of War or Human Rights regimes. This effort has been hampered, however, by the limits of each of these legal regimes.[18] Because of these limitations, international regulation of internal armed conflicts has been less than satisfactory.[19]

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[13] Republic of South Africa Promotion of National Unity and Reconciliation Bill (As submitted by the Portfolio Committee on Justice (National Assembly)), 1994, Bill 30-95, ch. 2 (legislation establishing South African Truth Commission). *See* Peter A. Schey, *Addressing Human Rights Abuses: The Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325 (1997) (discussing structure of South African truth commissions); Justin M. Swartz, *South Africa's Truth and Reconciliation Commission: A Functional Equivalent to Prosecution*, 3 DEPAUL DIG. INT'L L. 13 (1997) (excellent discussion of history of South African truth commission).

[14] *See* Jo M. Pasqualucci, *The Whole Truth And Nothing But The Truth: Truth Commissions, Impunity And The Inter-American Human Rights System*, 12 B. U. INT'L L.J. 336 (1994) (extensive overview and evaluation of some Latin American countries amnesty laws).

[15] *See* Prosecutor v. Tadic, No. IT-94-1-AR72 (Oct. 2, 1995) (international tribunal discussing the criminal conduct during internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996).

[16] *See* Scott Wilson, *Colombian General Convicted in Killings*, WASH. POST, Feb. 14, 2001, at A19 (reporting General Uscategui's conviction for failing to stop a massacre by paramilitary forces.); Leon Lazaroff, *Ex-Argentine Dictator Ordered Arrested in Disappearance of Spaniards*, ASSOCIATED PRESS, Mar. 25, 1997, *at* 1997 WL 4859107 (reporting Spanish court order arrest of General Galtiere, who is still in Argentina, Argentina has indicated it will not release him to Spanish courts.), *but see* Anthony Faiola, *Argentina Amnesty Overturned*, WASH. POST, Mar. 7, 2001 at A19 (reporting on an Argentine judge ruling striking down amnesty laws paving way for trials of soldiers involved in "Dirty War").

[17] *See* M. Cherif Bassiouni et al., *War Crimes Tribunals: The Record and the Prospects: Conference Convocation*, 13 AM. U. INT'L L. REV. 1383 (1998) (conference with various speakers including President Charles N. Brower, American Society of International Law, Dean Claudio Grossman, Washington College of Law, and The Honorable David J. Scheffer, former United States Ambassador-at-Large for War Crimes Issues, supporting the use of international criminal tribunals).

[18] *See* discussions *infra* Section II (The Law of Internal Armed Conflict), and Section III (discussing the relationship between Law of War and Human Rights).

[19] *See* discussion *infra* Section IV (The Future of the Law of Internal Armed Conflict).

An alternative is a renewed emphasis on domestic tribunals to enforce minimum humanitarian standards in internal armed conflicts.[20] The resort to external systems, such as international criminal tribunals should rarely occur. These selectively imposed tribunals add chaos to a society ravaged by internal armed conflict and do not represent the community which they judge.[21] Rather, the focus of international law after an internal armed conflict should be stabilization through the rule of law. This can be done through the presumptive reliance on domestic tribunals to enforce minimum humanitarian standards.

Drawing from the Law of War and Human Rights regimes, the Law of Internal Armed Conflict can focus the responsibility on states and parties to an internal armed conflict to enforce and comply with its standards. If the law demands that the parties must legitimize their conduct and that this process will be held to international humanitarian standards, then the likelihood of this occurring will increase. Ultimately, supporting domestic tribunals relying on the Law of Internal Armed Conflict rebuilds the state through the rule of law. For these reasons, this thesis advocates an approach to enforcement of minimum humanitarian standards that relies on the domestic institutions.

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[20] *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES §703 Part VII, Chapter 1 (1986) [hereinafter RESTATEMENT (THIRD)] (reporters' note six discussing need to exhaust domestic remedies for human rights violations before using international remedies), *see also id.* § 902, cmt. k (discussing exhaustion of local remedies before seeking a claim for a violation of an international obligation).

[21] *See* discussion *infra* Section V (Domestic Enforcement of the Law of Internal Armed Conflict).

II. The Law of Internal Armed Conflict

A foreign war is a scratch on the arm; a civil war is an ulcer which devours the vitals of a nation.[22]

At first glance, it may appear that international law has no place in internal conflicts. By definition, international law is concerned with events that are transnational in nature. Under customary international law and conventional law, however, there are exceptions to this rule. For example, both the Law of War[23] and Human Rights law might have application to purely domestic situations. This does not necessarily mean that these bodies of law apply to internal armed conflict, rather that some international law can apply to a purely domestic situation.

In this section, a broad examination of the Law of Internal Armed Conflict is conducted. The examination starts by exploring the Law of War and its expansion in

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[22] THE MILITARY QUOTATION BOOK 43 (1990) (quoting Victor Hugo).

[23] The Law of War is also known as International Humanitarian Law and the Law of Armed Conflict. International Humanitarian Law seems to be the preferred modern term. It has gained growing acceptance, because of the humanitarian concerns underlying this area of the law. It, however, has also increasingly been applied to describe both the Law of War and Human Rights regimes that might apply to an armed conflict. The more traditional term, the Law of War is unambiguous in its scope. Additionally, the traditional name recalls the true nature of the subject matter and more clearly delineates the body of law. *See* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 14 (1995).

The Law of War applies international rules to solve problems arising from international or internal armed conflicts. *See* Jean Pictet, *International Humanitarian Law: Definition, in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW xix n.1 (1988). Generally, the Law of War governs the relationship between states or belligerents in times of armed conflicts. Separate from it is Human Rights, which generally governs the relationship between a state and its citizens. *See* Paul Kennedy & George J. Andreopoplos, *The Laws of War: Some Concluding Reflections, in* THE LAWS OF WAR 214, 220 (1994); Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 324 INT'L REV. OF THE RED CROSS 409, 410 (1998).

response to humanitarian concerns. This expansion led to the birth of the Law of Internal Armed Conflict. The general conventional and customary parameters of the Law of Internal Armed Conflict are then examined.[24]

Throughout this examination process, the Law of War and the Law of Internal Armed Conflict distinction is kept clear. Both are similar in many respects, but this is a result of the Law of War being the primary source of the Law of Internal Armed Conflict. As will be shown, the Law of Internal Armed Conflicts remains unique in both its scope, the ability to reach into purely domestic matters; and its breadth, the type of conduct it regulates.

A. Applicability of the Law of War

The Law of War has been slowly migrating to internal armed conflicts. This makes sense given that what is seen as barbaric or reprehensible in an international armed conflict does not lose those characteristics when it occurs in the context of an internal armed conflict.[25] "There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those

[24] The rules governing internal armed conflict have primarily grown out of the body of law governing international armed conflict, the Law of War. This source of the Law of Internal Armed Conflict is discussed more fully *infra* Section II. The impact of Human Rights law in this area is not ignored and is discussed more fully *infra* Section III.

[25] Prosecutor v. Tadic, No. IT-94-1-AR72 para. 97 (Oct. 2, 1995) (discussing application of Law of War principles to internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996).

engaged in international wars."[26] The entire body of the Law of War, however, has not been transplanted to internal armed conflicts; rather minimum humanitarian standards are being created.[27]

To appreciate why the full body of the Law of War has not been transplanted to the Law of Internal Armed Conflict and to properly identify the Law of Internal Armed Conflict, an understanding of the parameters of the Law of War is necessary. These parameters provide definitions that have found use in developing the Law of Internal Armed Conflict. Rather than a detailed exploration of the Law of War, a broad overview is all that is necessary to begin the discussion of the Law of Internal Armed Conflicts, and subsequently, the enforcement of that law.[28]

1. Source of the Law of War

Continually developing, the Law of War is that body of rules that generally applies to international armed conflict.[29] It has deep historical roots and there are many

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[26] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 561 (1995) (examining the trend criminalizing conduct in internal armed conflicts).

[27] *See* Prosecutor v. Tadic, No. IT-94-1-AR72, paras. 116 126 (Oct. 2, 1995) (a full and mechanical transplant of the rules has not occurred, rather a corpus of general basic humanitarian principles and norms exist), *reprinted in* 35 I.L.M. 32 (1996). *See also* discussion *infra* Section II.

[28] The author expects the reader is familiar with the Law of War. The discussion that follows merely identifies the basis of the Law of War and some critical definitions, which impact the more detailed discussion on the Law of Internal Armed Conflict and its enforcement.

[29] *See* I THE LAW OF WAR, A DOCUMENTARY HISTORY, HUGO GROTIUS AND THE LAW OF WAR 3 (Leon Friedman ed., 1972) (for a detailed historical discussion of the Law of War).

examples of ancient civilizations regulating war.[30] Like most of international law, some of these rules were self-imposed by states, while others grew out of treaties between states.[31] Their general function was to regulate both the initiation of hostilities and the conduct of hostilities.[32] A broad range of values has motivated growth in the Law of War.[33] Recently the desire to lessen the tragedies associated with modern combat has served to drive the growth in the Law of War.[34]

There are two primary sources for the Law of War.[35] The first is customary international law. A rule achieves the status of customary international law when it is reflected in both state practice and *opinio juris*.[36] Importantly, this criteria requires state

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[30] *See* DONALD R. DUDLEY, THE CIVILIZATION OF ROME 95 (1962); Josiah Ober, *Classical Greek Times, in* THE LAWS OF WAR 12, 13-14 (Michael Howard et al. eds., 1994) (exploring the rules of war between Greek city-states including forbidden attacks, when battles were to be fought and the protection of non-combatants). *See also* JAMES E. BOND, THE RULES OF RIOT – INTERNAL CONFLICT AND THE LAW OF WAR 5-12 (1974) (discussing the historic code of chivalry governing the use of arms by knights against each other).

[31] *See* LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 12 (1956) (more historical background on the development of the Law of War).

[32] *See* ROBERT C. STACEY, *The Age of Chivalry, in* THE LAWS OF WAR 27, 30 (Michael Howard et al. eds., 1994) (discussing *Jus ad Bellum,* when resorting to war is permitted and *Jus in Bellum,* what means and method of warfare are permitted).

[33] Many commentators have eloquently discussed a broad range of reasons for the growth and development for the Law of War. For a positivist view, see CARL VON CLAUSEWITZ, ON WAR (Anotol Raport ed., Pelican Books 1968) (1832) (value of law is represented in its expression of national policy). For a realist view, see GEOFFREY BEST, HUMANITY IN WARFARE 1-27 (1980) (has value because it has a real effect on parties). For a modern legal critic view, see Roger Normand & Chris A.F. Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L.J. 387 (1994) (law is used to justify actions). Finally for the Utilitarian view, see TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970) (law as a tool to justify moral outcome).

[34] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (Professor Meron discusses how the Law of War has been acquiring a more humanitarian orientation under the influence of the human rights movement.).

[35] *See* RESTATEMENT (THIRD), *supra* note 20, § 102 (sources of international law).

[36] *Opinio juris* is the recognition by the state of the legal force of the rule and the state's willingness to be bound by the rule. *Id.* cmt. c (discussing *opinio juris*).

affirmation, factually, as evidenced by practice, and legally, as evidenced by a recognition that the norm has risen to the level of the law.[37] Generally, customary international law applies to all states, except for those that have persistently objected.[38] Certain customary norms, *jus cogen* norms, however, are non-derogable and states cannot avoid their binding effect through persistent objection; they apply to all states regardless.[39]

The second source for the Law of War is conventional law.[40] This source is typically those rules defined by treaties, conventions or agreements between states. Although a broad range of treaties governs the Law of War, The Hague[41] and Geneva[42] conventions, in particular, are the most comprehensive treatment of this area of the law.[43]

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[37] Factual recognition is found in state practice. *See id.* cmt. b (discussing state practice). Two locations for factual recognition are the military manual of the state and the implementation of those military regulations in the state's armed forces. These may serve as both factual and legal evidence of recognition.

[38] *See id.* cmt. d (discussing dissenting views and impact on new states).

[39] *See id.* cmt. k (discussing preemptory norms of international law such as U.N. Charter prohibition on the use of force).

[40] *See id.* § 102 (sources of international law).

[41] *See* Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations (Hague Convention No. IV), signed 18 Oct. 1907, 36 Stat. 2277, TS 539, 1 Bevans 631.

[42] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (known collectively as Geneva Conventions I-IV). *See generally* I THE LAW OF WAR, A DOCUMENTARY HISTORY, HUGO GROTIUS AND THE LAW OF WAR 3 (Leon Friedman ed., 1972) (for detailed background on growth, development and application of these conventions).

[43] Those limited portions of the Law of War that are directly applicable to internal armed conflicts will be discussed infra Section II.B, The Emerging Law of Internal Armed Conflict.

These conventions apply to all cases of declared war or any other international armed conflict that may arise between two or more of the state parties.[44] Similar to customary international law, these rules require state affirmation to give them legal value.[45] Unlike customary law, however, conventional law only binds its signatories, unless the treaty or its provisions have become custom.[46]

2. Triggering the Law of War

According to conventional law, to trigger the full body of the Law of War, there must be an armed conflict between two recognized parties; that is, it applies to international armed conflicts. This requires two determinations: first, whether an armed conflict exists; and second, whether that conflict is internal or international. Once the determination is made, that an armed conflict of international character exists, only then is the entire body of the Law of War applicable. The importance of the "trigger" is that it implements a broad range and scope of legal responsibilities.[47] Consequently, this

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[44] *See* Geneva Conventions I-IV, *supra* note 42.

[45] *See* RESTATEMENT (THIRD), *supra* note 20, § 301 (discussing requirement for state intention to be bound and consent to be bound).

[46] *See* RESTATEMENT (THIRD), *supra* note 20, § 321 cmt. a (discussing principle of *pacta sunt servanda*, to be bound by a treaty a state must be a party to that treaty). Some commentators suggest that the new International Criminal Court may attempt to circumvent this conventional rule. It may apply even to those states, which are not signators. This unusual growth was one of the primary concerns expressed by the United States over this court. For further discussion, see generally Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is and the Way Ahead*, 41 VA. J. INT'L. 204 (2000); Gregory P. Noone & Douglas W. Moore, *An Introduction to the International Criminal Court*, 46 NAV. L. REV. 112 (1999) (discussing the background to the creation of the International Criminal Court).

[47] The triggering mechanism is implemented under Geneva Convention Common Article 2. *See* Geneva Conventions I-IV, *supra* note 42, art. 2.

determination has great impact in defining when the Law of Internal Armed Conflict applies.

Historically, an armed conflict meeting the four-element test for "war" triggered Law of War application.[48] After World War II and the implementation of the Geneva Conventions, the test of armed conflict evolved to "any difference arising between two States and leading to the intervention of armed forces, . . . [i]t makes no difference how long the conflict last, or how much slaughter takes place."[49] A modern test is "whether such force constitutes an armed attack, in the context of its scope, duration and intensity."[50] This provides a useful starting point for distinguishing between force, which may or may not reach the level of armed conflict.

The next determination is the international nature of the conflict.[51] The Law of War, generally, requires state on state conduct, so it becomes critical to determine that

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[48] The four historic elements were: (1) a contention; (2) between at least two nation states; (3) wherein armed force is employed; (4) with an intent to overwhelm. *See* I THE LAW OF WAR, A DOCUMENTARY HISTORY, HUGO GROTIUS AND THE LAW OF WAR 3 (Leon Friedman ed., 1972). Accordingly, some nations asserted the Law of War was not triggered by all instances of armed conflict. As a result, the applicability of the Law of War could depend upon the subjective national classification of a conflict. *See* WALTER GARY SHARP, SR., CYPERSPACE AND THE USE OF FORCE 55 (Aegis Res. Corp. 1999).

[49] COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 17-21, (Jean S. Pictet ed., 1958). The International Committee of the Red Cross Commentary on Common Article 2 spelled out a threshold definition of armed conflict by emphasizing three criteria: (1) scope; (2) duration; or (3) intensity. *See id.* Although each case will be fact dependent, under this definition, any use of force—regardless of its scope, duration, or intensity, occurring between members of the armed forces of two states might be characterized as the existence of de facto hostilities. This definition has not been accepted by the United States. *See* WALTER GARY SHARP, SR., CYPERSPACE AND THE USE OF FORCE 66 (Aegis Res. Corp. 1999).

[50] *See* WALTER GARY SHARP, SR., CYPERSPACE AND THE USE OF FORCE 66-67 (Aegis Res. Corp. 1999).

[51] Additional Protocol I, article 1(4) expanded the definition of international armed conflict to include conflicts against racists regimes, colonial domination, and alien occupation in addition to the customary

states are involved.[52] International law establishes four criteria to define an entity as a state.[53] Territory, population, government, and the conduct of international relations remain the clearest evidence of statehood.[54] A state may continue to be regarded as such even though during an occupation, invasion or insurrection its internal affairs become anarchic for an extended period of time.[55] Obtaining the status of a state in the international system carries with it a fundamental right under international law, territorial inviolability.[56] The status of statehood also carries with it the obligation to comply with international law and to assume the responsibilities flowing under international law.[57] Similar to armed conflict, the status of statehood has acquired a "triggering" importance.

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inter-State definition. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977).

[52] *See* Geneva Convention I-IV, *supra* note 42, arts. 1, 2. Common Article 2 applies to all cases of armed conflict between *two* or more parties. *See id.*

[53] RESTATEMENT (THIRD), *supra* note 20, § 201. The test for statehood is summarized by the Restatement of Foreign Relations as

> (a) defined territory (which can be established even if one of the boundaries is in dispute or some of the territory is claimed by another state); (b) a permanent population (the population must be significant and permanent even if a substantial portion in nomadic); (c) the state must be under the control of its own government; and (d) the capacity to conduct international relations.

Id.

[54] *See id.*

[55] *See* RESTATEMENT (THIRD), *supra* note 20, § 202 (Reporter's note 4 discusses the recognition of a state, whose viability is doubtful because of internal armed conflict.).

[56] *See* RESTATEMENT (THIRD), *supra* note 20, § 206 cmt. b (discussing sovereignty and the idea that a state's lawful control over its territory is exclusive as to other states). The duty among states to respect the territorial sovereignty of other states is also reflected in the UN Charter. *See* U.N. CHARTER art. 2(7).

[57] *See* RESTATEMENT (THIRD), *supra* note 20, § 206 cmt. e (discussing generally the rights and duties of states imposed by international law and agreements). *See also* Letter of Submittal by Secretary of State to U.S. President on Additional Protocols to Geneva Conventions (Dec. 13, 1986) (on file with author) ("[T]he rights and duties of international law attach principally to entities that have those element of sovereignty that allow them to be held accountable for the actions, and the resources to fulfill their obligations.").

If the conflict does not involve multi-state conduct, it generally does not trigger the international obligations under the Law of War.

In sum, the Law of War generally requires an armed conflict between states. Once these conditions are met, the entire body of the Law of War is triggered.[58] If the Law of War is not triggered, then other international regimes, such as the Law of Internal Armed Conflict, might apply.

3. Expansion of the Law of War

From its historical roots, the Law of War continues to grow. In modern times, this growth has been characterized as a movement from a state focused system to an international human-centric approach.[59] This change, similar to the definitions discussed previously, has had an important impact on the enforcement of the Law of War, and consequently, the enforcement of the Law of Internal Armed Conflict.

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[58] Deceptively simple, this analysis continues to pose challenges to international jurists. *See generally* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000). Professor Meron discusses the continuing debate on applying the Law of War in internal armed conflicts and four continuing problem areas. *See id.* at 274. The specific Law of War rules applicable to internal armed conflict will be discussed infra Section II.B. Generally, though the Law of War scheme was devised for international conflict resolution.

[59] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000) (Professor Meron traces the evolution of the Law of War from an interstate to an individual human centric perspective.).

Historically, domestic tribunals were to prosecute Law of War violations.[60] A shift from relying solely on domestic tribunals to also allowing international tribunals recognized that in an international dispute, a party neutral to the conflict provided this balance, while preserving and respecting the sovereignty of the parties to the conflict.[61] This successful balancing of states' interest in sovereignty, the international interest in stability, and the humanitarian interests served to further the international regulation of this conduct.

Currently though, domestic tribunals are still expected to be the primary enforcement mechanism of the Law of War.[62] This presumption is reflected in the recent international efforts in Kosovo and East Timor where domestic tribunals were reestablished with the assistance of the international community.[63] Similarly, the

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[60] *See.* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts,* 6 DUKE J. COMP. & INT'L L. 11, 21 (1995) (discussing the assumption of domestic tribunal responsibility for the enforcement of the Law of War). "The overwhelming majority of legal cases in connection with the laws of war have been national, not international, courts." *Id.* at 20.

[61] This idea of a neutral party is embodied in the Geneva Conventions by the establishment of Protecting Powers "whose duty it is to safeguard the interests of the Parties to the conflict." *See* Geneva Convention I, *supra* note 42, art. 8; Geneva Convention II, *supra* note 42, art. 8; Geneva Convention III, *supra* note 42, art. 8; Geneva Convention IV, *supra* note 42, art. 9. The idea of a neutral institution is also inherent in the International Court of Justice's resolution of disputes between state parties. *See, e.g.,* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14 (Judgment of 27 June) (here the International Court of Justice served as an arbiter); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Request for the Indication of Provisional Measures, 1992 I.C.J. 115, 125 (April 14) (again the International Court of Justice as a neutral form to resolve dispute between states over providing terrorist for trial).

[62] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) ("National systems of justice have a vital, indeed, the principal, role to play here.").

[63] *See* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 51-53 (2001) (discussing the UN-led efforts to reestablish a domestic judiciary).

proposed hybrid domestic court of Cambodia with mixed domestic and international jurists supports this recognition of reliance on domestic tribunals.[64]

In addition to this reliance on domestic tribunals, the Law of War also generally applied to conduct between states; in other words, it was state-centric in character. While even its earliest conventions conferred various protections on individuals, as well as on states, whether those protections flowed to the state or to the individuals remained unclear.[65] The conventions were not seen as creating individual rights.[66] Rather, traditionally the Law of War assumed that its rules bound states.[67]

In governing the relationship between states, it is now seen that the Law of War also imposes certain duties, responsibilities, and rights that inure both to the state and to individuals.[68] Historically, violations of the Law of War were prosecuted by an

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[64] *See Letter from the Prime Minister of Cambodia to the Secretary-General*, UN Doc A/53/866, S/1999/295 (Mar. 24 1999) ("To ensure that the [Khmer Rouge] trial by the existing national tribunal of Cambodia meets international standards, the Royal Government of Cambodia welcomes assistance in terms of legal experts from foreign countries.").

[65] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 251 (2000). "The treatment to be accorded to persons under the Conventions was not necessarily seen as creating a body of rights to which those persons were entitled." *Id.*

[66] *See* 1 LASSA OPPENHEIM, INTERNATIONAL LAW 341 (Hersch Lauterpacht ed., 8th ed. 1955).

[67] *See id.*

[68] The Nuremburg Principle, the applicability of universal jurisdiction to international crimes has been widely accepted. *See* Judicial Decisions, *International Military Tribunal (Nuremburg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947). *See also* George Aldrich, *Individuals as Subjects of International Humanitarian Law, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 851, 853 (Jerzy Makarczyk ed., 1996) ("the development of international humanitarian law since the second world war has made individual criminal liability an explicit part of the law"); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (discussing the protection of individual rights by universal jurisdiction for Law of War violations).

individual's national court or the captor's national court; however, now prosecution of an individual, not of either state or party to the conflict, is possible.[69] The Law of War is also recognized as justifying prosecution by third-party countries in accordance with the principal of universal jurisdiction.[70] In addition, under the Geneva Convention, all the parties to the convention have the duty to prosecute or to extradite persons alleged to have committed violations of the Law of War regardless of that party's involvement in the conflict.[71]

In effect, the obligation between states under the Law of War has become an obligation in support of individuals.[72] The substitution of "international humanitarian law" for "law of war" and "law of armed conflict" descriptively reflects this movement.[73] "Although the term 'international humanitarian law' initially referred only to the four 1949 Geneva Conventions, it is now increasingly used to signify the entire law of armed

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[69] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 253 (2000).

[70] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 562-63 (1995) (discussing when a treaty does not specify who is competent to exercise jurisdiction over an offense, interpretation of that treaty may lead to the conclusion that third party states are permitted to exercise jurisdiction). *See also* ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 1 (Martinus Nijhoff Publishers 1996) (Chapter 8 generally discusses the prosecution of breaches of the Law of War).

[71] *See* Geneva Convention I, *supra* note 42, art. 49, 6 U.S.T. at 3146; Geneva Convention II, *supra* note 42, art. 50, 6 U.S.T. at 3250; Geneva Convention III, *supra* note 42, art. 129, 6 U.S.T. at 3418; Geneva Convention IV, *supra* note 42, art. 146, 6 U.S.T. at 3616. (describing the duty of state parties to enact criminal domestic laws against violating the Law of War and when to extradite persons). *See also* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 253 (2000); CHADWICK, *supra* note 70, at 1 (both authors discussing this duty to prosecute).

[72] *See* George Aldrich, *Individuals as Subjects of International Humanitarian Law, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 851, 853 (Jerzy Makarczyk ed., 1996).

[73] *See* GEOFFREY BEST, HUMANITY IN WARFARE 21 (1980); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

conflict."[74] The modern focus of the Law of War has broadened from solely protecting states' interests to increasingly protecting human interests.[75]

4. Conclusion

Historically, the Law of War generally governed conduct between states in an international armed conflict. It has grown to govern conduct between states and also individual conduct in an international armed conflict.[76] Pressure for humanitarian protections for all individuals regardless of state roles or circumstances has also expanded the Law of War.[77] Even though it now inures to the benefit of individuals, the Law of War remains generally limited to international armed conflict.

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[74] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000). This would include the Hague rules and the various treaties and conventions limiting the methods and means of warfare. *Id.* Some commentators also include human rights obligations in the term international humanitarian law. *See* CHADWICK, *supra* note 70, at 5 (discussing international humanitarian law as including Human Rights law); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 24 (1996) (defining Human Rights law as including the Law of War).

[75] THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 10 (1989) (discussing that while the Law of War protects the rights of states it also contains a protects individuals).

[76] The Nuremburg Principle, the applicability of universal jurisdiction to international crimes is widely accepted. *See* Judicial Decisions, *International Military Tribunal (Nuremburg), Judgment and Sentences,* 41 AM. J. INT'L L. 172, 221 (1947). *See generally* Kaufman, *Judgment at Nurnberg - An Appraisal of its Significance,* 40 GUILD PRAC. 62 (1983) (for a historical discussion of the origins of the Nuremburg principles. For a recent application of the principle see Prosecutor v. Tadic , No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing individual criminal responsibility in international armed conflict), *reprinted in* 35 I.L.M. 32 (1996).

[77] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 253 (2000); George Aldrich, *Individuals as Subjects of International Humanitarian Law, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 851, 853 (Jerzy Makarczyk ed., 1996); *see, e.g.,* Declaration of Minimum Humanitarian Standards, *adopted at* Abo Akademi University Institute for Human Rights in Turku/Abo, Finland (December 2, 1990) (non-binding declaration made at international conference as a model that states could adopt), *reprinted in* 89 AM. J. INT'L L. 218-223 (1995). This is an example of the continuing human rights pressure to expand the Law of War to cover areas it has not traditionally applied to. *See* discussion *infra* Section III regarding the confluence between the Law of War and Human Rights.

B. The Emerging Law of Internal Armed Conflict

International law prohibitions that apply to international wars are gradually being extended to non-international armed conflicts.[78] Given that an international armed conflict triggers the Law of War, it seems axiomatic to suggest that the Law of War is applicable to internal armed conflicts. Generally, this is correct. In developing the Law of War, however, limited specific rules were created that apply to the unique situation of internal armed conflict.[79] The entire body of the Law of War was not intended to govern internal armed conflict. Rather, these limited rules were to provide some of the same tempering of the conflict, that the Law of War brought to international armed conflict, while respecting the sovereignty of the state embroiled in the internal armed conflict.[80] The expansion of the Law of War explored above and the continued desire to apply these developments to internal armed conflict has given rise to a new international legal regime, the Law of Internal Armed Conflicts.[81]

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[78] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing the gradual migration of international armed conflict regulations to internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996). *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 574 (1995).

[79] Common Article 3 to the Geneva Convention embodies these rules. *See* Geneva Conventions I-IV, *supra* note 42, art. 3. Common Article 3, common to all four conventions, is dealt with more completely *infra* text accompanying note 87.

[80] *See* COMMENTARY ON IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 34 (Jean S. Pictet ed., 1958) (Common Article 3 "merely provides for application of the principles of the Convention and not for the application of specific provisions").

[81] It is interesting to note that the most comprehensive rules governing an internal armed conflict, the Lieber Codes of the U.S. Civil War era, served as a basis for developing the Law of War. These codes, however, have not yet been used as a separate historical basis for the Law of Internal Armed Conflict. Although, they do serve as an example of an internal armed conflict humanely regulated and domestically enforced. *See* F. Lieber, *Instructions for the Government of Armies of the United States in the Field, reprinted in* THE LAWS OF ARMED CONFLICTS 3-23 (Schindler & Toman eds., 3d ed. 1988).

Because the Law of Internal Armed Conflict emanates from the Law of War, its sources and the rules regulating them are similar. Additionally, the motivation of recognizing humanitarian concerns also underlies the Law of Internal Armed Conflict. Similar to the Law of War, the Law of Internal Armed Conflict is found in conventional law[82] and customary international law.[83] Also, like the Law of War, the Law of Internal Armed Conflict continues to grow. This growth will impact how it might be enforced. As will be shown, however, the Law of Internal Armed Conflict is distinct from the Law of War. While the Law of War serves as the primary historical source of the Law of Internal Armed Conflict, the two should remain distinct albeit with many similarities.[84] In this part, this new regime's sources in conventional and customary law are explored.

1. Conventional Law of Internal Armed Conflict

Various treaties and conventions govern internal armed conflict. Most of these treaties and conventions attempt to limit the conduct of parties in conflict. This effort, however, has met with limited success because of the continuing concern of states in not allowing regulation of internal matters by an outside authority.[85] As one commentator explains, the states "feared that any outside encroachments on their sovereignty might be

[82] *See* discussion *infra* Section II.B.1 (Conventional Law of Internal Armed Conflict).

[83] *See* discussion *infra* Section II.B.2 (Customary Law of Internal Armed Conflict).

[84] *See* discussion *infra* Section V.A (The Need for a Distinct International Legal Regime).

[85] Hernan Salinas Burgos, *The Application of International Humanitarian Law as Compared to Human Rights Law in Situations Qualified as Internal Armed Conflict, Internal Disturbances and Tensions, or Public Emergency, with Special Reference to War Crimes and Political Crimes, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 1 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers) (1989). *See also* GEOFFREY BEST, HUMANITY IN WARFARE 20-21 (1980).

a possible attempt on their territorial integrity and political independence."[86] While this intrusion on state sovereignty continues to channel development in this area of the law, the application of these conventions and treaties that govern internal armed conflicts, even in limited circumstances, has served as a basis for the growth of the law. Primarily, the conventional law falls in four broad areas, Common Article 3 of the Geneva Conventions, Additional Protocol II to the Geneva Conventions, miscellaneous treaties affecting the means and method of warfare, and certain human rights treaties.

a. Geneva Conventions, Common Article 3

Conventionally, Common Article 3 (common to all four Conventions) of the Geneva Conventions is perhaps the original statement of the Law of Internal Armed Conflict.[87] In general, all four Geneva Conventions deal primarily with the conduct of international armed conflicts.[88] Only Common Article 3 deals specifically with "the case of armed conflict not of an international character."[89] The protections are minimal.[90] Its

[86] A. Cassese, *La Guerre Civile ie le Droit International* [*International Law in Civil Wars*], 90 *Revu Generale de Droit International Public*, 554, 569 (1986).

[87] *See* Geneva Conventions I-IV, *supra* note 42, art. 3.

[88] *See* Geneva Conventions I-IV, *supra* note 42.

[89] *See* Geneva Conventions I-IV, *supra* note 42, art. 3. It is important to note that there are three situations of internal armed conflict where the entire body of the Law of War is still triggered. These are: (1) partial or total occupation of a territory of a High Contracting Party; (2) the armed forces of State X is assisting rebels in State B (this raises the question of armed conflict between two States); (3) conflicts which people are fighting for their right to self-determination under Article 1(4) of Protocol I. *See* Francoise Hampson, *Human Rights and Humanitarian Law in Internal Conflicts, in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 66 (Brit. Inst. Int'l & Comp. L 1989).

[90] Common Article 3 provides the following protections.

potency, however, lies in that what was previously a domestic matter is now subject to international law. This intrusion is limited, however, as the concern for state sovereignty remains strongly reflected by Common Article 3.[91]

Notwithstanding its limitations, Common Article 3 forms the primary basis for the conventional Law of Internal Armed Conflict by setting out the fundamental principles of humanity that apply in internal armed conflicts.[92] These minimum safeguards have been applied to all citizens within the country during internal armed conflicts.[93] Common

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> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arm and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humility and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> (2) The wounded and sick shall be collected and cared for.

See Geneva Conventions I-IV, *supra* note 42, art. 3.

[91] Common Article 3 specifically provides that "[t]he application of the proceeding provisions shall not affect the legal status of the Parties to the conflict." *Id.* This limitation denies international legal status to insurgents, thus eliminating a possible basis for third country intervention. It also denies combatant immunity to insurgents, thus eliminating legal protection for insurgent actions.

[92] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14 (Judgment of 27 June). Common Article 3 principles are elementary consideration of humanity that cannot be breached in any armed conflict, internal or international. *See id.*

[93] *See, e.g.,* Prosecutor v. Tadic, No. IT-94-1-AR72, paras. 103, 126 (Oct. 2, 1995) (discussing broad scope of Common Article 3), *reprinted in* 35 I.L.M. 32 (1996).

Article 3 binds each "party to the conflict" including the insurgents or rebels.[94] Nor is there any stated minimum threshold of violence to trigger its application.[95]

A concern by the parties to the conventions, however, was that by providing these limited protections, legitimacy might also inure to the benefit of the participants in the internal armed conflict.[96] Specifically, no state wanted to grant legitimacy, through international law recognition, to rebels or insurgents that might exist within their territorial boundaries, and thus possibly justify another state's intervention.[97] Additionally, states were concerned about granting combatant immunity to rebels.[98] Nations were unwilling to give this immunity to those trying to destroy them from within.

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[94] *See* Geneva Conventions I-IV, *supra* note 42, art. 3 (this is different from Common Article 2 which binds each party to the Convention). *See also* COMMENTARY ON I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (Jean S. Pictet ed., 1960) (discussing need for insurgents to possess an organized military force, with an authority responsible for its action, acting within a determinate territory, and respecting and complying with the Laws of War); Jean S. Pictet, *International Humanitarian Law: Definition, in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW xix n.1 (1988) (discussing scope of parties covered by Common Article 3).

[95] Common Article 3 speaks of armed conflicts, but does not define them. Designed to supplement Common Article 3, Protocol II defines armed conflict and excludes certain types of violence. This might suggest that Common Article 3 may not apply to such situations either. *See supra* notes 106-26, and accompanying text. In practice, however, it has been suggested that "Common Article 3 applies to all situation of a non-international character whatever the level of violence." *See* Hampson, *supra* note 89, at 67-68. *But see* COMMENTARY ON I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (Jean S. Pictet ed., 1960) (discussing the need for insurgents to possesses an organized military force, with an authority responsible for its actions, acting within a determinate territory, and respecting and complying with the Laws of War).

[96] JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTIONS OF WAR VICTIMS 56 (1975). *See also* Burgos, *supra* note 85, at 2-3 (discussing the need to balance state interest in fighting rebels and basic humanitarian standards).

[97] COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 44 (Jean S. Pictet ed., 1958). Common Article 3 "meets the fear . . . that the application of the Convention, even to a limited extent, in cases of civil war may interfere with the *de jure* Government's lawful suppression of the revolt, or that it may confer belligerent status, and consequently increased authority and power, upon the adverse Party." *Id.*

[98] Combatant immunity is a blanket immunity for warlike acts (such as murder, maiming, kidnapping, sabotage) that members of the armed forces will do to the opposing armed forces. "In international armed

Common Article 3, however, was not intended to confer legitimacy or combatant immunity on any party to an armed conflict.[99] The drafters of Common Article 3 clearly stated that "[t]he application of the proceeding provisions shall not affect the legal status of the Parties to the conflict."[100] Common Article 3 is meant only to establish fundamental standards not define status.[101]

In effect, the significance of lack of status is two-fold. First, Common Article 3 does not prevent a state from punishing people subject to its jurisdiction for having committed crimes under the domestic law of that state.[102] The rebel, insurgent or citizen who kills a politician, policeman or a soldier can be treated as a murderer.[103] Common Article 3 does not prevent such a person from being condemned to death, provided the process is conducted under the minimum stated guarantees.[104] States can consider the

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conflicts, the law of war provides prisoners of war with a blanket of immunity for their pre-capture warlike acts." Geoffrey S. Corn & Michael L. Smidt, *To Be or Not to Be, That is the Question" Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW. June 1999 at 14 (discussing status of captured service members in recent Kosovo conflict). In effect, upon capture of an opposing soldier, the captor state could not then accuse and try that soldier for the earlier killing of a captor state's soldier during the normal course of battle. *See id.*

[99] *See supra* note 97. Without legal status as combatants, insurgents cannot claim combatant immunity for their warlike acts. *See supra* note 98.

[100] *See* Geneva Conventions I-IV, *supra* note 42, art. 3.

[101] COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (Jean S. Pictet ed., 1958). "It merely demands respect for certain rules," it does not "increase in the slightest the authority of the rebel party." *Id.*

[102] *See id.* (discussing that Common Article 3 imposes no additional obligations on the state, that are not already observed in the prosecution of "common criminals").

[103] Burgos, *supra* note 85, at 6.

[104] *Id.; see also* COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (Jean S. Pictet ed., 1958) (dealing with internal enemies, the

legal status of rebels or insurgents as criminal.[105] On balance, the same could be said for government forces. A state actor who kills innocent bystanders, a rebel's family member, or even a rebel may claim combatant immunity, but similarly runs the risk of investigation and trial, conducted under the minimum stated guarantees.[106] Second, if the rebels or insurgents lacked international legal status, the right to intervene in that state's domestic affairs by another state was diminished.

The challenge regarding Common Article 3 is the refusal by parties to apply it, even in situations where it is clearly applicable.[107] As shown, states demand a high level of deference to state sovereignty. Meanwhile, the insurgents or rebels, especially those who view terrorism as an essential combat technique, refuse to deem themselves bound through any obligatory legal mechanisms designed to humanize the conflict.[108]

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government need apply only those essential rules that it in fact observes daily, under its own laws). "There is nothing in [Common Article 3] to prevent a person presumed to be guilty from being arrested. . . and [Common Article 3] leaves intact the right of the State to prosecute, sentence and punish according to the law." *Id.* at 39.

[105] *See* Robert Kogod Goldman, *Internal Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U.J. INT'L & POL'Y 49, 57-58, 61 (1993).

[106] *See* Burgos, *supra* note 85, at 6. *See, e.g.,* Anthony Faiola, *Argentina Amnesty Overturned*, WASH. POST, Mar. 7, 2001, at A19 (reporting that an Argentine judge struck down amnesty laws, thereby paving the way for trials of soldiers involved in "Dirty War"); Scott Wilson, *Colombian General Convicted in Killings*, WASH. POST, Feb. 14, 2001, at A19 (reporting on General Uscategui conviction for failing to stop a massacre by paramilitary forces).

[107] Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 599 (1983) (citing George Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 A.S.I.L. PROC. 141, 142 (1973)). *See also* CHADWICK, *supra* note 70, at 211 (discussing the unwillingness to utilize the Law of War legal regime when circumstances justify it, hinders constructive movement).

[108] *See* CHADWICK, *supra* note 70, at 129-33. *See also* Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Convention of 1949 and Other Human Rights Instruments: The American Red Cross – Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts, April 12-13, 1983,* 33 AM. U. L. REV. 9, 14 (1983) ("antigovernment forces in armed conflicts have not always been eager to invoke Common Article 3 either, probably because they are reluctant to be bound by its provisions").

Even given these challenges, Common Article 3 remains the original conventional statement of the Law of Internal Armed Conflict. Balancing minimum protections with state sovereignty, it remains a primary source of the Law of Internal Armed Conflict. The challenges in its implementation guided the next major attempt to codify the Law of Internal Armed Conflict.

b. Additional Protocol II of the Geneva Convention

In 1974, the international community called for another Geneva Convention to modernize the Law of War.[109] This led to Additional Protocol II of the Geneva Convention, which further develops the Law of Internal Armed Conflict.[110] Like Common Article 3, it covers combatants and non-combatants.[111] It requires both sides of the conflict to provide certain minimal treatment, to include that all parties "shall in all circumstances be treated humanely, without any adverse distinction."[112] Protocol II

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[109] *See* THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS (Howard S. Levie ed., 1987) (for a historical discussion of the background leading to the 1974 Geneva Conventions).

[110] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 (1977)[hereinafter Additional Protocol II].

[111] *See id.* art. 2

[112] *See id.* art. 4.

applies to all armed conflicts not covered by Protocol I.[113] Protocol II, however, is different from Common Article 3.

First, Protocol II has a narrower application than Common Article 3.[114] It establishes an upper and lower limit for armed conflict that did not exist before. On the upper end of the spectrum of conflict, it excludes those conflicts where rebel forces have reached a belligerent status; these conflicts are governed by Protocol I.[115] Under Protocol I, these conflicts although internal in nature, would trigger the entire body of the Law of War.[116]

On the lower end of the spectrum of conflict, Protocol II does "not apply to situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[117] This requirement might suggest an ongoing and sustained conflict similar to that required under the Law of War.[118] The threshold of application entailed in Protocol II might

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[113] *See id.* art. 1.

[114] *See* Jean de Preux, *The Protocols Additional to the Geneva Conventions*, 320 INT'L REV. RED CROSS 473, 481 (1997) ("[I]t was not possible to give Protocol II a field of application comparable to that of [Common] Article 3.").

[115] *See* Additional Protocol II, *supra* note 110, art. 1. (applies "to all armed conflicts not covered by" Protocol I).

[116] *See supra* note 51 (discussing scope of Protocol I). This might make states even more reluctance to support the application of the Protocols.

[117] *See* Additional Protocol II, *supra* note 110, art. 1(2). As discussed *supra* note 95, Common Article 3 did not specifically define "armed conflict." This new language, similar to language found in the Commentary to the original Geneva Protocols is now codified. *See* COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (Jean S. Pictet ed., 1958).

[118] *See supra* text accompanying note 48 (regarding definition of armed conflict).

arguably be so high that only full-scale civil wars qualify for protection.[119] If a full-scale civil war occurs, this may trigger Protocol I and the entire body of the Law of War. In effect, Protocol II may be so narrowly tailored as to eliminate itself.

Protocol II also does not clarify whether the dissident armed forces must apply the Protocol or whether they must merely have the capacity to apply the Protocol.[120] In other words, it arguably could allow a party to disregard its application if the other party to the conflict is not applying it.[121] When compared to Common Article 3, Protocol II has a higher threshold for application with only minor provisions relating to combat and a couple of provisions that could lend themselves to such a strict interpretation as to nullify the Protocol.[122]

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[119] *See* Analytical Report of the Secretary-General, Submitted Pursuant to Commission on Human Rights Resolution 1997/21, paras. 79-80, U.N. Doc. E/CN.4/1998/87; THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS (Howard S. Levie ed., 1987); John R. Crook, *Strengthening Legal Protection in Internal Conflicts: Introductory Remarks: Panel on Internal Conflicts*, 3 ILSA J. INT'L & COMP. L. 491 (1997); Burgos, *supra* note 85, at 9; L.C. Green, *Low Intensity Conflict and the Law*, 3 ILSA J. INT'L & COMP. L. 493 (1997); Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 599 (1983) (all discussing the thresholds of application created by Additional Protocol II).

[120] *See* Additional Protocol II, *supra* note 110, art. 1(1) (requiring the dissident armed forces be sufficiently organized "as to enable them" to implement this protocol). *See also* Hampson, *supra* note 89, at 66-67. "It is not clear whether the dissident armed forces must manifest the ability to apply the Protocol by doing so or if it is sufficient that they have the capacity or ability to do so." *Id.*

[121] Additional Protocol II, *supra* note 110, art. 1(1). *See* Jean de Preux, *The Protocols Additional to the Geneva Conventions*, 320 INT'L REV. RED CROSS 473, 479 (1997) (discussing guerillas who do not respect the Law of War may be disqualified from its protections). *See also* Lysaght, *supra* note 108, at 12. "The reality of life is that governments will agree to treat rebels as prisoners-of-war when and only when it is expedient in order to secure similar treatment for their own troops." *Id.* at 21.

[122] *See* Lysaght, *supra* note 108, at 22-21 (citing A. Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict,* in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 467, 496 (A. Cassese ed. 1979)). Although sympathizing with the disappointment of those who hoped for a more comprehensive protocol governing internal armed conflict, Mr. Lysaght concludes that Protocol II is a significant advance over Common Article 3 and the various nonderogable articles of human rights treaties. *Id.*

Still, Protocol II has value. First, like Common Article 3, it outlines detailed protections that include prohibitions against collective punishments, slavery, and pillage.[123] It also specifies what forms of violence and outrages upon personal dignity are prohibited.[124] These prohibitions apply at all times and all places for conflicts meeting the Protocol's definition.[125]

Protocol II also attempts to allay state fear of granting legitimacy and combatant immunity to rebel forces or insurgents. Protocol II specifies that "[n]othing in the Protocol, shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State."[126]

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[123] Protocol II prohibitions include:

> (a) violence to the life, health and physical or mental well being of person, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) collective punishments;
> (c) taking of hostages;
> (d) acts of terrorism;
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> (f) slavery and the slave trade in all their forms;
> (g) pillage;
> (h) threats to commit any of the foregoing acts

See Additional Protocol II, *supra* note 110, art. 4(2).

[124] *Id.*

[125] *Id.* Although, Common Article 3 remains broader in application because it arguably applies at all times and not just during conflicts meeting the definition of Protocol II. *See* discussion *supra* note 95.

[126] Additional Protocol II, *supra* note 110, art. 3(2). In effect, like Common Article 3, no legal status is created by this Protocol, thus this provision is also relied upon as denying combatant immunity status to the rebels. *See* discussion *supra* note 98.

Protocol II has brought greater specificity to the Law of Internal Armed Conflict.[127] Signed and ratified by many states, it still has not achieved the status that Common Article 3 has attained.[128] Notwithstanding, it has served as an important step in further defining the Law of Internal Armed Conflict.

c. Other Treaties and Conventions

Various treaties and conventions regulating warfare have application to internal armed conflicts, although, the regulation of internal armed conflict is not their purpose.[129]

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[127] *See* Jean de Preux, *The Protocols Additional to the Geneva Conventions*, 320 INT'L REV. RED CROSS 473, 481 (1997) ("it is a step forward"); Lysaght, *supra* note 108, at 22-21 ("it must be concluded that Protocol II, in terms of rights stated, constitutes a significant advance over what is contained in Common Article 3 of the 1949 Geneva Conventions"). *But see* George H. Aldrich, *Comments on the Geneva Protocols*, 320 INT'L REV. RED CROSS 508, 510 (1997) ("As for Protocol II, I regret that the Diplomatic Conference largely failed."); A. Cassese, *A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict,* in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 467, 496 (A. Cassese ed. 1979) (concluding that Protocol II is not as broad a Common Article 3); G.I.A.D. Draper, *Humanitarianism in the Modern Law of Armed Conflicts, in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 18 (Brit. Inst. Int'l & Comp. L 1989) ("Protocol II cannot be considered a substantial advance of humanitarian principles in the law of internal armed conflicts an area in which it is particularly needed.").

[128] Protocol II has been signed by 154 parties and ratified by 150 parties, while 189 parties have ratified Common Article 3. *See* International Committee of the Red Cross, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts, at* http://www.icrc.org/ihl/nsf (last visited Mar. 16, 2001).

[129] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, art. 22, 38 I.L.M. 769 (1999) (applies to armed conflicts not of an international character); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21, 103d Cong. (1993), 32 I.L.M. 800 (1993) (concerns both control and use); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 (applies in all circumstances); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997) (applies in all circumstances); Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate effects, *opened for signature* Apr. 10, 1981, 19 I.L.M. 1523 (1980) (applies in all circumstances); Protocol II on Mines, Booby-Traps and Other Devices, May 3, 1996, 35 I.L.M. 1206 (1996) (applies to all conflicts governed by Common Article 3).

These treaties rely on implementation both domestically and internationally.[130] Generally, these treaties have focused on outlawing in any international or internal conflict the use of various methods and means of warfare, such as landmines, biological or chemical weapons.[131] When discussing the enforcement of the Law of Internal Armed Conflict, these treaties, similar to Common Article 3 and Protocol II are further evidence that states acknowledge domestic or international regimes for the regulation of internal conduct. In addition, they serve as a conventional basis for the Law of Internal Armed Conflict.[132]

d. Human Rights Obligations.

Another area of law that was not developed specifically to regulate internal armed conflict is Human Rights law. Human Rights law primarily deals with the protection of individuals and groups as citizens against state conduct.[133] Under most Human Rights treaties, however, the protections are not absolute.[134] The state can ignore certain rights and obligations during times of national crisis, such as internal armed conflicts.[135]

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[130] *See* sources cited *supra* note 129.

[131] *See* sources cited *supra* note 129. *See also* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 119 (Oct. 2, 1995) (discussing the gradual extension to internal armed conflict of the rules embraced by the various treaties regulating methods and means of warfare), *reprinted in* 35 I.L.M. 32 (1996).

[132] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 262 (2000) (discussing the application of treaties governing methods and means to internal armed conflicts).

[133] *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 24 (1996) (discussing scope of Human Rights law).

[134] *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter International Covenant on Civil and Political Rights] (parties may derogate in times of public emergency); American Convention on Human Rights, *opened for*

These treaties, however, may also include non-derogable rights or those rights that a state may not ignore no matter the national situation.[136] Treaties with non-derogable rights continue to govern state conduct towards individuals during an internal armed conflict. Unlike Law of War treaties, which govern all parties to the conflict, these limitations only apply to the state.[137] This anomaly arises from the expectation that the state will serve to function as the guarantor of these rights.

Under the emerging Law of Internal Armed Conflict certain rights and obligations find their origin in Human Rights law.[138] These conventional human rights are very

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signature Nov. 22, 1969, OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, OAS Treaty Series, No. 36 (1970), *reprinted in* 1969 Y.B. HUMAN RIGHTS 390; 65 AM. J. INT'L L. 679 (1971) [hereinafter American Convention on Human Rights] (parties may derogate in times of "war, public danger, or other emergency that threatens the independence or security of a State Party); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T. S. 221, *reprinted in,* 1950 Y.B. HUMAN RIGHTS 418 [hereinafter European Convention for the Protection of Human Rights] (article 15 permits derogation during times of war or other public emergency which threatens life of the nation).

[135] This right of derogation arises when the existence of the state is threatened. *See* sources cited *supra* note 134. *See also* Hampson, *supra* note 89, at 61-65 (discussing generally derogable human rights).

[136] *See* sources cited *supra* note 134. For example, the 1966 International Covenant on Civil and Political Rights permits no derogation in respect of the right to life, the right not to be tortured, ill treated, or enslaved and the right not to be punished by *ex post facto* laws. *See* International Covenant on Civil and Political Rights, *supra* note 134, art. 4(2). The European Convention on Human Rights contains similar non-derogable protections. *See* European Convention for the Protection of Human Rights, *supra* note 134, arts. 2, 3, 4(1), 7. The American Convention on Human Rights non-derogable protections include right to life, freedom from torture and freedom from *ex post facto* laws. *See* American Convention on Human Rights, *supra* note 134, art. 27(2).

[137] *See* Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted Pursuant Commission on Human Rights Resolution 1997/21, para. 9, UN Doc. E/CN.4/1998/87 (1998) ("[T]he rules of international human rights law have generally been interpreted as only creating legal obligations for Governments, whereas in situation of internal violence, it is also important to address the behavior of non-State armed groups."). *See also* AMNESTY INTERNATIONAL, MUDDYING THE WATERS, THE DRAFT "UNIVERSAL DECLARATION ON HUMAN RESPONSIBILITIES": NO COMPLEMENT TO HUMAN RIGHTS (1998) (AI Index No. IOR 40/02/98) (stating position against applying Human Rights obligations to non-state actors), *available at* http://www.amnesty.org/ailib/index.html.

[138] *See* discussion *infra* Section III (discussing Human Rights law impact).

similar to the protections provided by Common Article 3 and Protocol II.[139] These rights serve as additional evidence in the establishment of minimum conventional standards applicable in an internal armed conflict.[140]

As this part demonstrates, there exists a broad conventional basis governing internal armed conflict. Common Article 3 serves as the primary convention for the Law of Internal Armed Conflict. Additional Protocol II was also developed to govern internal armed conflict and serves as another conventional source for the Law of Internal Armed Conflict. Certain other treaties and conventions regulating methods and means of war may also regulate the conduct of states during an armed conflict in all settings, international and internal. Finally, Human Rights treaties with non-derogable provisions also may apply their protections to internal armed conflict. Although all these conventions and treaties have limitations, they all serve as conventional sources for the Law of Internal Armed Conflict.

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[139] They include at least: (1) the right to life; (2) the prohibition on torture; (3) the prohibition on cruel, inhuman or degrading treatment; (3) the prohibition on slavery; and (4) the prohibition on retroactive criminal legislation or punishment. RESTATEMENT (THIRD), *supra* note 20, § 702. *Compare* Human Rights Treaties *supra* note 134, *with* discussion of Common Article 3, *supra* note 90, *and* Additional Protocol II, *supra* note 123 (demonstrating the similarity of many of the protections provided by these various sources).

[140] THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, ch. II (1989) (discussing the human rights instruments as becoming reflective of customary international law). *See also* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 274 (2000) (discussing fundamental standards of humanity that cannot be derogate from and would apply during internal armed conflicts).

2. Customary Law of Internal Armed Conflict

For the Law of Internal Armed Conflict, under customary international law, significant growth has occurred. [141] This growth, however, has developed slowly and unevenly, out of action and reaction to practice, rather than systematically or by major leaps like conventional law. Many of these customary requirements are reflected in the conventional law.[142] Importantly though is that even after codification, customary international law maintains its authority, particularly as regards states that do not adhere to or are not parties to the codifying treaty.[143] In fact, some customs rise to the level of peremptory norms or *jus cogen.*[144] These are laws that create norms that obligate all states and parties.

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[141] Customary law and conventional law have equal authority as international law. RESTATEMENT (THIRD), *supra* note 20, § 102 cmt. j. The primary difference is that customary law generally applies to all states, whereas conventional law only applies to the parties to the convention. *See id.*

[142] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14, 114, paras. 218-220 (Judgment of 27 June) (affirming that Common Article 3 is declaratory of customary international law). *See also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 1 (1989) (Chapter 1 discusses humanitarian instruments as customary law.). *See generally* I. SINCLAIR, THE INTERNATIONAL LAW COMMISSION 138-45 (1987) (discussing the relationship between codification and and customary international law).

[143] *See* RESTATEMENT (THIRD), *supra* note 20, § 102 cmt. k (discussing persistent objectors).

[144] "A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACK'S LAW DICTIONARY 864 (7th ed. 1999). "There is general agreement that the principles of the United Nations Charter prohibiting the use of force are *jus cogens*." RESTATEMENT (THIRD), *supra* note 20, § 102, at 34 (reporter's note 6). *Jus cogen* norms include prohibitions on genocide, slave trade, and gross violations of human rights. *Compare id.* (discussing *jus cogen* norms generally) *and* text accompanying *infra* note 159 (discussing fundamental human rights), *with* Common Article 3, *supra* note 90, art. 3 (discussing Common Article 3 protections) *and* Additional Protocol II, *supra* note 110, art. 4(2) (discussing Protocol II protections).

State practice and *opinio juris* provide evidence of customary law.[145] Explicit evidence that a state considers a practice obligatory is not necessary, it can be inferred from a state's action or omissions.[146] However, if a state follows a practice, but considers it to be non-binding, there is no *opino juris*, and that practice may not become customary law for that state.[147]

Many sources are used to determine customary law. Actual acts, claims, diplomatic acts and instructions, declarations, official statements of policy, national laws, court judgments, other governmental acts or omissions, and even acquiescence to acts of other states are examples of this evidence.[148] For example, historic use has established

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[145] RESTATEMENT (THIRD), *supra* note 20, § 102 (discussing sources of international law).

[146] *Id.* § 102 cmts. b, c (discussing state practice and *opinio juris*).

[147] *Id.* § 102, at 32 (reporter's note 2) (discussing Norway's successful maintance of a different system of delimiting its territorial zone) (citing Fisheries Case (United Kingdom v. Norway), I.C.J. Rep. 116 (1951)). Another example is the U.S. position on the application of the entire body of the Law of War to internal armed conflicts. Although, in practice, the U.S. armed forces apply the Law of War in all operations, this application is done as a matter of policy and not obligation. *See* DEP'T OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998).

[148] RESTATEMENT (THIRD), *supra* note 20, § 103. The Restatement provides a useful list:

> substantial weight is accorded to
> (a) judgments and opinions of international judicial and arbitral tribunals;
> (b) judgments and opinions of national judicial tribunals;
> (c) the writing of scholars;
> (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

Id. Importantly, the Restatement also notes that this list is not in order of precedence or inclusive. *Id. See also* International Court of Justice Statute Article 38, which provides the following sources of evidence of international law:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

custom.[149] Military regulations and manuals reflecting how states expect their armed forces to act can serve as evidence of custom.[150] Additionally, reports by international organizations regarding the law may provide guidance on whether the law has achieved customary status.[151]

With this broad range of possible sources to draw from, the customary Law of Internal Armed Conflict may be as broad as the conventional law. For example, courts,[152] agencies,[153] and commentators[154] have recognized Common Article 3, a key part of the Law of Internal Armed Conflict, as customary international law. Similarly,

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Id.

[149] *See, e.g.,* W. Hays Park, *Joint Service Combat Shotgun Program*, ARMY LAW. Oct. 1997 at 16 (exploring legality of combat shotgun by relying on its historical use).

[150] *See, e.g.,* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 106 (Oct. 2, 1995) (examining Nigerian Armed Forces' code of conduct in determining customary character of Common Article 3), *reprinted in* 35 I.L.M. 32 (1996).

[151] *See* RESTATEMENT (THIRD), *supra* note 20, § 103 cmt. c (discussing in comment c that although international organizations do not have authority to make law, their pronouncements provide evidence of custom). For an example of an international organization providing guidance on the customary law, see COMMENTARY ON I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (JEAN S. PICTET ed. 1960).

[152] *See, e.g.,* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14 (Judgment of 27 June) (discussing customary character of Common Article 3); Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing Law of War and specifically Common Article 3 as becoming increasingly reflected in custom), *reprinted in* 35 I.L.M. 32 (1996).

[153] *See, e.g.,* DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10, paras. 11, 499 (1956); DEFENCE MINISTRY, NEW ZEALAND DEFENCE FORCE DIRECTORATE OF LEGAL SERVICES, at 112 (1992) (Interim Law of Armed Conflict Manual para. 1807, 8); Humanitares Volkerrecht in bewaffneten Conflikten – Handbuch [Military Manual of Germany], DSK AV2073200065, para. 1209 (August 1992) (unofficial translation) (all manuals discussing breaches of Common Article 3 as criminally punishable).

[154] *See, e.g.,* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 244 (1996) (discussing the development of Common Article 3 into customary international law). *See generally* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 1 (1989) (discussing in Chapter 1 humanitarian instruments, specifically Common Article 3 and Protocol II as becoming customary law).

the protections of Additional Protocol II have reached the level of customary international law although its limitations perhaps have not.[155] Protocol II's broad acceptance, however, adds to the evidence of state practice and *opinio juris* supporting the Law of Internal Armed Conflict.[156] A recent international criminal tribunal in Yugoslavia also concluded that customary rules for internal armed conflict had developed to the point where they govern "protection of civilians from hostilities, . . . protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibitions of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities."[157]

In addition, certain non-derogable human rights have risen to the level of customary international law.[158] These human rights include protection from:

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,

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[155] Message from the President of the United States, Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims on Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, Letter of Transmittal, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III-IV (1987) (discussing the obligations contained in Protocol II).

[156] Protocol II has been signed by 154 parties and ratified by 150 parties, while 189 parties have ratified Common Article 3. *See* International Committee of the Red Cross, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts, at* http://www.icrc.org/ihl/nsf (last visited Mar. 16, 2001).

[157] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 127 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996). *But see* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 241-42 (1996) (Although, agreeing with the chamber's legal conclusions, Professor Meron concludes that the chamber's list of rules applicable to internal armed conflicts may be over inclusive.).

[158] *See* RESTATEMENT (THIRD), *supra* note 20, § 702 (discussing customary international law of human rights).

(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(e) a consistent pattern of gross violations of internationally recognized human rights. [159]

Like most customary international law, this list is neither complete nor closed.[160] As these rights are non-derogable, these human rights have the force of law regardless of the type of conflict.[161] These rights, originating from Human Rights law, apply to internal armed conflicts; therefore they form part of the Law of Internal Armed Conflict.

As outlined, the scope of customary Law of Internal Armed Conflict is broad. It combines the customary protections found in Common Article 3, Protocol II, various other treaties affecting armed conflicts and certain Human Rights treaties. Unlike conventional law, though, customary international law may be binding on all parties to the conflict: the state and the insurgents. This obligation on non-state parties does not legitimize their conduct or legalize their role; rather the reach of the law is indiscriminate.

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[159] *Id.*

[160] *See id.* cmt. a.

[161] *See id.* cmt. n (discussing the *jus cogen* nature of these rights). *See* United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), 1980 I.C.J. REP. 3, 41 (discussing the imperative character of these legal obligations notwithstanding the circumstances).

C. Conclusion

The Law of Internal Armed Conflict has developed out of the Law of War. Although increasingly human centric, the Law of War is still limited in its application to internal armed conflicts. Specifically, it requires state conduct and armed conflict. A need was seen to extend protections beyond these limits, while still respecting the sovereignty of the state. Prohibitions that previously only applied to international wars are slowly being extended to internal armed conflicts. [162]

Historically, from the Law of War, Common Article 3 was intended as a limited intrusion into state sovereignty. It establishes minimum standards of conduct during all conflicts including internal armed conflicts. [163] In addition, other regimes, such as Protocol II, various arms control treaties and Human Rights treaties, apply to internal armed conflicts. Debate over this intrusion of rules into internal armed conflict, primarily revolves around four principle issues:

> (1) where the threshold of applicability of international humanitarian law is not reached.
> (2) where the state in question is not a party to the relevant treaty or instrument;
> (3) where the derogation from the specified standards is invoked; and

[162] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 574 (1995) (discussing war crimes and internal conflicts).

[163] *See* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing the historical role of Common Article 3), *reprinted in* 35 I.L.M. 32 (1996). *See* also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Merits, 1986 I.C.J. 14 (Judgment of 27 June) (discussing role Common Article 3 to internal armed conflicts).

(4) where the actor is not a government, but some other group.[164]

The Law of Internal Armed Conflict has emerged in response to this debate. Now reflected in conventional law and increasingly in customary law, the Law of Internal Armed Conflict continues to grow.

Recently, Human Rights law has driven the Law of Internal Armed Conflict's development. These Human Rights rules, generally not applicable to internal armed conflict, are having a substantial effect on the emergence of this new body of law. This migration from the Human Rights regimes to the Law of Internal Armed Conflict regime will be explored next.

III. Confluence or Confusion: A River from Two Streams

Dovery no provery.[165]

Since the 1950's, the Law of War has found a potent partner in the growing regime of Human Rights.[166] They both serve to protect the individual person, but the

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[164] Theodor Meron, *Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards,* 89 AM. J. INT'L L. 215, 217 (1995).

[165] Ronald Reagan quoting the Russian maxim, "trust, but verify" on the signing of the INF treaty at The White House, December 8, 1987, *quoted in* THE QUOTABLE RONALD REAGAN 311 (Peter Hannaford ed., 1998).

[166] G.I.A.D. Draper, *Humanitarianism in the Modern Law of Armed Conflicts, in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 4-5

exact juxtaposition of these two bodies of law is unclear, even though, their mutual support is apparent.[167] The relationship between the two regimes is so close that a U.N. General Assembly resolution on the development of the Law of War was titled "Respect for Human Rights in Armed Conflicts."[168]

It would be wrong to assume that this close relationship existed from the outset. From separate legal categories, it is only recently that the Law of War and Human Rights similarities have been explored.[169] These similarities have been the basis for the confluence of many enforcement proposals.[170] To appreciate, however, any proposed solution to the enforcement of the Law of Internal Armed Conflict; it is useful to understand the migration that has occurred between these two distinctive areas of law.[171]

In this section, the traditions of the Law of War and Human Rights regimes are explored, as is their subsequent confluence. Then the practical differences between these

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(Brit. Inst. Int'l & Comp. L 1989) (discussing the historical and theoretical connections between the Law of War and Human Rights law).

[167] *See* Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 412-13 ("international humanitarian law and international human rights law are near relations"). *See also* John Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, 324 INT'L REV. RED CROSS 445 (1998) ("the two subjects are now considered different branches of the same discipline); CHADWICK, *supra* note 70, at 5 (International humanitarian law is "understood to be divided into two main branches: the law of war and limited aspects of human rights law.").

[168] G.A. Res. 2444, U.N. GAOR, 23rd Sess., 1748th plen. mtg., U.N. Doc.A/RES/2444 (1968).

[169] Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 409 (discussing history and differences between Law of War and Human Rights regimes).

[170] *See* Walter Kälin, *The Struggle Against Torture,* 324 INT'L REV. RED CROSS 433, 444 (1998) ("weakness in one area can most often be compensated by invoking instruments belong to the other").

[171] Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (exploring the migration of principles from Human Rights to the Law of War).

two regimes are investigated. These practical differences produce dissimilar enforcement strategies, which are also explored. This examination of historical, practical and enforcement differences, lays the groundwork for discussing the future of the Law of Internal Armed Conflict and its subsequent enforcement.

A. Historical Differences

The primary distinction between the Law of War and Human Rights regimes relates to their historic development.[172] As discussed previously, the Law of War has deep historical roots.[173] Evolving primarily in Europe, it is one of the oldest areas of public international law.[174] Arriving later are Human Rights regimes developed out of the theories of the Age of Enlightenment and finding "their natural expression in domestic constitutional law."[175] After the Second World War, the mutual relationship between the Law of War and Human Rights began. [176] Two seminal conventions embodied these legal regimes.

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[172] Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 410.

[173] *See* sources cited *supra* note 30 (describing Law of War in antiquity).

[174] *See* G.I.A.D. Draper, *Humanitarianism in the Modern Law of Armed Conflicts, in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 5 (Brit. Inst. Int'l & Comp. L 1989) (discussing the historical perspective of the Law of War).

[175] Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 410. Some examples include: from the United Kingdom, the 1628 Petition of Rights, the 1679 Habeas Corpus Act, and the 1689 Bill of Rights; from the United States of America, the 1776 Declaration of Independence and the 1776 Virginia Bill of Rights; from France, the 1789 Declaration of the Rights of Man and of the Citizen. *Id.*

[176] *Id.* ("[T]he end of the 1940s was when human rights law was first placed beside" the Law of War.) ; Christina M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 31, 35 (Frits Kalshoven & Yves Sandoz eds. Martinus Nijhoff Publishers 1989) (discussing the relationship between Human Rights regimes and the Law of War).

For Human Rights law, this was the 1948 Universal Declaration of Human Rights.[177] It is an aspirational instrument meant to lead to a convention on human rights that would be binding on the signatories.[178] This convention, though drafted, was never completed.[179] Drafted under the auspices of the United Nations, the Declaration and the draft Convention on Human Rights were only intended for times of peace.[180] Later Human Rights treaties also specifically limited their application during times of internal armed conflict.[181] Defining the relationship of states to their nationals, Human Rights, were to be implemented domestically with remedies for violations available at the municipal level.[182] The focus was more on state conduct, rather than individual responsibilities.[183]

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[177] *See* GA Res. 217A(111), U.N. Doc. A/810 (1948).

[178] The Declaration as a U.N. General Resolution has no force of law and is not a treaty. *See* RESTATEMENT (THIRD), *supra* note 20, § 102 (sources of international law). Since its passage, however, it has attained a normative character. *See id.* §701 (Reporters' note six discusses the debate regarding the binding nature of the Declaration, and concludes that the "Declaration has become the accepted general articulation of recognized rights.").

[179] *See* Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 413.

[180] *See* Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law*, *supra* note 167, at 446 (these treaties were "primarily concerned with the relationship between States and their nationals in time of peace."). *See also* Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 412-13.

[181] *See* International Covenant on Civil and Political Rights, *supra* note 134, art. 4; American Convention on Human Rights, *supra* note 134, art. 27; European Convention for the Protection of Human Rights, *supra* note 134, art. 15 (each article discussing the right of derogation). *See also* Djamchid Momtaz, *The Minimum Humanitarian Rules Applicable in Periods of Internal Tension and Strife*, 324 INT'L REV. RED CROSS 455, 457 (1998) (discussing human rights instruments authorizing participating states to restrict their obligations in periods of crisis).

[182] *See* International Covenant on Civil and Political Rights, *supra* note 134, art. 2(3) (creating the obligation of state parties to provide an effective remedy for violations); American Convention on Human Rights, *supra* note 134, art. 25 (requiring states to provide remedies under national laws); European Convention for the Protection of Human Rights, *supra* note 134, art. 13 (requiring remedies under national

At the same time, much of the modern Law of War was being codified at the Geneva Conventions. Mention was made of human rights during the drafting of the Geneva Conventions, but it was mostly in passing and vague terms.[184] The scope of the conventions were on protected persons (sick, wounded, prisoners of war, civilians) and rights were defined in relation to that status; unlike human rights law where rights are derived "solely from the quality of being human."[185] Even the fourth convention, dealing with civilians, explicitly noted that the Law of War did not apply to the relations between a state and its nationals.[186]

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law for violations). *See also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 139 (1989) ("The duty of a state to provide remedies under its national law for violations of human rights is perhaps implicit in human rights treaties which require national implementation and whose effectiveness depends on the availability of municipal remedies.").

[183] *See* Walter Kälin, *The Struggle Against Torture,* 324 INT'L REV. RED CROSS 433, 442 (1998) (discussing the prevention, enforcement and reparation strategies of human rights regimes). *See also* AMNESTY INTERNATIONAL, MUDDYING THE WATERS, THE DRAFT "UNIVERSAL DECLARATION ON HUMAN RESPONSIBILITIES": NO COMPLEMENT TO HUMAN RIGHTS (1998) (AI Index No. IOR 40/02/98) (arguing for a continuation of this policy of not applying Human Rights obligations to non-state actors and instead leaving the focus on state conduct), *available at* http://www.amnesty.org/ailib/index.html.

[184] FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, vol. II, sec. A, at 165, 323, 692, 780 (1950).

[185] Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 416.

[186] "A person is only a legal subject within a State and the provisions concerning the protection of civilians in time of war take no account of disputes which may exist between the State and its own citizens." COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 372-73 (Jean S. Pictet ed., 1958). Although, perhaps perceptively the commentator "concludes that a doctrine which 'is today only beginning to take shape'–human rights–could one day broaden the scope" of the Law of War. Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 418 (quoting COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 373 (Jean S. Pictet ed., 1958)).

The 1968 Tehran International Conference on Human Rights marked a historical confluence of the Law of War and Human Rights.[187] These two different legal regimes were treated as the branches of the same discipline.[188] "A number of factors have contributed to this merger, including the growing significance of international criminal law and the criminalization of serious violations of human rights."[189] The Law of War and Human Rights, however, remain separate historical and theoretical legal regimes.

B. Practical Differences

A number of practical reasons also underlie the continued distinction between these two bodies of law. First, the Law of War and Human Rights were the focus of two different institutions, a dichotomy between the International Committee of the Red Cross

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[187] Twenty years after the adoption of the Universal Declaration of Human Rights, the United Nations convened its first in a series of "mega-conferences." *See* Christina M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 39 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989). Held in Tehran, this conference was dedicated to human rights. *Id.* The conference met from 22 April to 13 May 1968 to set out the United Nations human rights agenda for the future. *Id. See also* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 267 (2000) ("Soon after the [Tehran Conference], the U.N. General Assembly adopted Resolution 2444, (XXIII), entitled 'Respect for Human Rights in Armed Conflicts.'"); Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law*, *supra* note 167, at 445 ("[T]he 1968 Tehran International Conference on Human Rights" changed the situation dramatically.).

[188] *See* Christina M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 39 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989) ("Resolution No. XXIII [Respect for Human Rights in Armed Conflicts] brought [the Law of War], for the first time, squarely within the framework of the international human rights legal regime."). *See also* Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 412-13 ("From a historical standpoint, it must be emphasized that this common front hardly existed before the adoption of Resolution XXIII.").

[189] Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law*, *supra* note 167, at 445.

and the United Nations respectively.[190] The United Nations International Law Commission, for example, did not consider the Law of War among the international law subjects selected for codification.[191] This attitude can be understood only in a post-war context. "The United Nations, the guarantor of international human rights, wanted nothing to do with the Law of War." [192] Instead, the United Nations' focus remained on Human Rights law, while the International Committee of the Red Cross focused on the Law of War.[193] In addition, the International Committee of the Red Cross did not want to move any closer to the essentially political organization, the United Nations, or its focal point, Human Rights. [194] So these two bodies of law are practically represented by two different institutions.

Additionally, Human Rights regimes are applicable primarily in peacetime.[195] In contrast, the Law of War has minimal relevance to peacetime. The Law of War applies

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[190] Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 416 (discussing the different UN and International Committee of the Red Cross institutional roles in the development of the Law of War and Human Rights).

[191] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1949, at 281, para. 18 (1950). It was considered "that if the Commission, at the very beginning of its work, were to undertake this study (on the laws of war), public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace." *Id.*

[192] Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 411.

[193] *See id.*

[194] *See id.* (citing SEVENTEENTH INTERNATIONAL RED CROSS CONFERENCE REPORT, STOCKHOLM 48 (1948)(describing an adopted amendment that urged the International Committee of the Red Cross that "in view of the non-political character of the constituent bodies of the International Red Cross, to exercise the greatest care in [its] relationship with intergovernmental, governmental or non-governmental organizations")).

[195] *See* Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law*, *supra* note 167, at 446 (these treaties were "primarily concerned with the relationship between States and their nationals in time of

during times of international armed conflict and limited times of internal armed conflict.[196] Times of international armed conflict were when the greatest threat to a state's sovereignty existed as it was the "imposition by force" of one nation's will upon another.[197] Even in these circumstances, when the legitimacy of the state's concern for its sovereignty was paramount, the Law of War prohibitions continued to apply. In contrast, Human Rights law allows states to derogate from their obligations regarding all but certain fundamental rights during a war and internal armed conflicts.[198]

Another practical difference is the regulated conduct of each regime. Under Human Rights law, "no one may be deprived of life except in pursuance of a judgment by a competent court."[199] Applying to relationships between unequal parties, Human Rights law emphasizes the individual as the subject of rights and aims to protect physical integrity and human dignity of the governed from their governments.[200] In contrast, the Law of War allows, or at least tolerates "the killing and wounding of innocent human

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peace."). *See also* Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 412-13.

[196] *See* discussion *supra* Section II.A.2 (Triggering the Law of War).

[197] CARL VON CLAUSEWITZ, ON WAR 13, 118-19 (Anatol Rapoport ed., Pelican Books 1968) (1832) (discussing war as a continuation of state policy).

[198] This right of derogation is when the existence of the state is threatened. *See* International Covenant on Civil and Political Rights, *supra* note 134 (parties may derogate in times of public emergency); American Convention on Human Rights, *supra* note 134 (parties may derogate in times of "war, public danger, or other emergency that threatens the independence or security of a State Party); European Convention for the Protection of Human Rights, *supra* note 134 (permitting derogation during times of war or other public emergency which threatens life of the nation). *See also* CHADWICK, *supra* note 70, at 76 (discussing derogation during times of internal armed conflicts); Hampson, *supra* note 89, at 61-65 (discussing generally derogable human rights).

[199] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000).

[200] *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 101 (1989) (discussing the differences between human rights law and other traditional field of international law).

beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage."[201] Limits on personal freedoms, rights to courts, and avenues of appeal are all permissible under the Law of War, whereas in Human Rights law these limits are the subject of proscription.[202] The Law of War can also greatly limit freedom of expression, assembly and movement.[203] Human Rights obligations, in comparison, guarantee these rights.[204] Finally, the Law of War has expanded to regulate the conduct of all parties in their individual and state capacity.[205] Whereas, Human Rights law continues to be primarily concerned only with relations between states and their nationals, and not non-state actors.[206]

In sum, both historical and practical differences separate the Law of War and Human Rights. The practical differences include the focus of different institutions,

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[201] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000).

[202] *Id.*

[203] *Id.*

[204] *See* International Covenant on Civil and Political Rights, *supra* note 134, arts. 19, 21 (guaranteeing freedom of expression, and assembly respectively); American Convention on Human Rights, *supra* note 134, arts. 13, 15, 22 (guaranteeing freedom of expression, assembly and movement respectively); European Convention for the Protection of Human Rights, *supra* note 134, arts.10, 11 (guaranteeing freedom of expression and assembly respectively).

[205] XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 533-35 (1948) (establishing the legitimacy of individual responsibility of Law of War violations). *See also* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (discussing the future of prosecutions of serious violations of the Law of War).

[206] *See* RESTATEMENT (THIRD), *supra* note 20, § 701 (discussing the obligations to respect human rights as inuring to the state). *See also* Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481, 487 (1998) ("[H]uman right standards cannot be applied to acts committed by private individuals or group."); AMNESTY INTERNATIONAL, MUDDYING THE WATERS, THE DRAFT "UNIVERSAL DECLARATION ON HUMAN RESPONSIBILITIES": NO COMPLEMENT TO HUMAN RIGHTS (1998) (AI Index No. IOR 40/02/98) (stating position against applying Human Rights obligations to non-state actors and continuing current focus of solely on state conduct), *available at* http://www.amnesty.org/ailib/index.html.

application primarily at different times, regulation of different conduct, and focus on different actors. "The two systems, Human Rights law and the Law of War, are thus distinct, and in many respects different."[207] These differences are also reflected in their respective enforcement regimes.

C. Enforcement Differences

A number of coercive and non-coercive measures are available to Human Rights and Law of War regimes.[208] Traditionally though, each has developed its own primary enforcement scheme. Like most international law regimes, both the Law of War and Human Rights regimes recognize the importance of principally relying on domestic enforcement schemes and institutions to ensure compliance.[209]

To secure compliance with its rules, the Law of War contemplates domestic criminal prosecution and punishment of those individuals who violate its prohibitions.[210]

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[207] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000).

[208] *See* DIETER FLECK ET AL., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 525 (1995) (outlining thirteen different measures to ensure compliance).

[209] *See* R. Wieruszewski, *Application of International Humanitarian Law and Human Rights Law: Individual Complaints, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 443 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989) (discussing the principle that most international agreements on human rights leave the task of implementation to state parties); Michael F. Lohr & William K. Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. LEG. STUD. 33, 35 (1999) (discussing that the clearest current deterrent to widespread violation of the Law of War is found in state domestic law and the disciplinary codes and judicial systems of the various armed forces).

[210] *See* Geneva Convention I, *supra* note 42, arts. 49-50; Geneva Convention II, *supra* note 42, arts. 50-51; Geneva Convention III, *supra* note 42, arts. 129-30; Geneva Convention IV, *supra* note 42, arts 146-147 (discussing penal sanctions and grave breaches in each of the articles). *See also* Dugard, *Bridging the Gap*

These criminal sanctions, however, were set up in the case of international armed conflict.[211] For example, "grave breaches," as defined by the Geneva Conventions, can occur only in international armed conflicts and most of the remaining law is largely inapplicable in non-international armed conflicts.[212] The Nuremberg and Tokyo War Crimes Tribunals saw a comprehensive application of the criminal enforcement mechanism in the Law of War at the international level.[213] More recently, the International Criminal Tribunals for Yugoslavia and Rwanda have built upon this legacy of international criminal prosecution of Law of War violations.[214]

Historically, neither Common Article 3 nor Protocol II contemplated the prosecution of violations of their standards.[215] This view is rapidly changing as

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Between Human Rights and Humanitarian Law, *supra* note 167, at 445 ("in the final resort [the Law of War] contemplate[s] prosecution and punishment of those individuals who violate their norms."); Michael F. Lohr & William K. Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. LEG. STUD. 35, n. 6 (1999) (discussing the United States consistent willingness to discipline its own and citing recent prosecutions of Law of War violations).

[211] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 79 (Oct. 2, 1995) ("grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the [Geneva] Conventions committed in international armed conflicts."), *reprinted in* 35 I.L.M. 32 (1996).

[212] *See id.*; *see also* Mary Griffin, *Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century*, 838 INT'L REV. RED CROSS 369, 371 (2000) ("customary international law has not yet developed to the point of extending its coverage of grave breaches to internal armed conflicts").

[213] XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 533-35 (1948); *see generally* RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 10-19 (1973) (discussing the Tokyo trials).

[214] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 79 (Oct. 2, 1995) (conviction for a Law of War violation), *reprinted in* 35 I.L.M. 32 (1996); Prosecutor v. Akayesu, Judgment, No. CTR-96-4-T (Sept. 2, 1998) (conviction for a crime against humanity in an internal armed conflict), *summarized in* 37 I.L.M. 1401 (1998).

[215] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 559 (1995). "Until very recently, the accepted wisdom was that neither common Article 3. . . nor Protocol II . . . provided a basis for universal jurisdiction, and that they constituted, at least on the international plane, an uncertain basis for individual criminal responsibility." *Id.* (citing Dennis Plattner, *The Penal Repression of*

international criminal tribunals exercise their jurisdiction to try crimes encompassed by norms in the Law of Internal Armed Conflict.[216] The international criminal enforcement mechanism or its threatened use is increasingly viewed as the best method of ensuring compliance.[217]

Under Human Rights regimes, the approach also begins with domestic enforcement.[218] In 1978, the United Nations recommended a set of guidelines for the functioning of domestic institutions.[219] It recommended that these institutions should be authorized to receive complaints; possess independent fact-finding facilities; and provide redress through conciliation or other appropriate remedies such as compensation.[220]

Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts, 30 INT'L REV. RED CROSS 409, 414 (1990) ("IHL applicable to non-international conflict does not provide for international penal responsibility of persons guilty of violations.")).

[216] Prosecutor v. Tadic, No. IT-94-1-AR72, para.134 (Oct. 2, 1995) ("customary international law imposes criminal liability for serious violations of Common Article 3"), *reprinted in* 35 I.L.M. 32 (1996). *See also* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 8(2) c & e, U.N. Doc. A/CONF.183/9 (1998)[hereinafter Rome Statute] (governing the elements of crimes for conduct in internal armed conflicts), *reprinted in* 37 I.L.M. 999 (1998).

[217] *See* Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 EMORY INT'L L. REV. 213 (2000)(arguing in support of implementation of the International Criminal Court); Jonathan I. Charney, *Progress in International Law?*, 93 AM. J. INT'L L. 452 (1999) ("Many believe that this progress heralds a breakthrough in the achievement of rights protected by international criminal law.").

[218] *See* International Covenant on Civil and Political Rights, *supra* note 134, art. 2(2) (discussing use of domestic measures); American Convention on Human Rights, *supra* note 134, art. 2 (discussing implementation through domestic measures); European Convention for the Protection of Human Rights, *supra* note 134, art. 35 (discussing need to exhaust domestic remedies). *See also* R. Wieruszewski, *Application of International Humanitarian Law and Human Rights Law: Individual Complaints, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 443 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989) ("states should adopt appropriate legislation in order to give effect to the rights recognized in those [Human Rights] treaties").

[219] UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, SEMINAR ON NATIONAL AND LOCAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, GENEVA 18-29 SEPT. 1978, U.N. Doc. ST/HR/SER.A/2 (1978).

[220] *See id.*

These domestic institutions play an important role on the international plane, as several international Human Rights instruments require exhaustion of local remedies before a complaint can be taken to an international institution.[221]

Although, the Charter of the United Nations, and the Universal Declaration of Human Rights expound fundamental standards, they do not establish formal mechanisms.[222] Rather, it was later treaties, both universal and regional, that elaborated on these standards and created mechanisms for their enforcement.[223] At the international level, there are three methods by which Human Rights bodies monitor Human Rights treaties: periodic national reports, individual and non-governmental organization petitions, and inter-state complaints.[224]

These bodies have varying powers of enforcement over the state parties that have agreed to their jurisdiction, ranging from the "legally binding orders of the European

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[221] *See* International Covenant on Civil and Political Rights, *supra* note 134, art. 28; American Convention on Human Rights, *supra* note 134, art. 46; European Convention for the Protection of Human Rights, *supra* note 134, art. 35 (each article requiring the exhaustion of domestic remedies). *See also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 171-182 (1989) (discussing exhaustion of local remedies rule).

[222] *See* U.N. CHARTER; Universal Declaration of Human Rights, GA Res. 217A(111), U.N. Doc. A/810 (1948).

[223] *See* International Covenant on Civil and Political Rights, *supra* note 134; American Convention on Human Rights, *supra* note 134; European Convention for the Protection of Human Rights, *supra* note 134.

[224] *See* R. Wieruszewski, *Application of International Humanitarian Law and Human Rights Law: Individual Complaints, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 443-44 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989) (discussing methods of implementation of Human Rights law); Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law*, *supra* note 167, at 446 (discussing Human Rights implementation).

Court of Human Rights, to the 'views' of the U.N. Human Rights Committee."[225] Neither the periodic national reports, which are supposed to "indicate the factors and difficulties, if any, affecting the implementation of the present Covenant,"[226] nor the inter-state complaints system provide individuals with remedies for violations of their human rights.[227] Rather under these mechanisms, state compliance with Human Rights standards is ensured by publicity and persuasion.[228] The individual or nongovernmental petition does not provide direct standing for the individual whose rights have been violated.[229] Instead it serves "as a source of information about these violations."[230] With few exceptions,[231] international human rights procedures are used to investigate wide-spread violations and do not contemplate enforcement by means of the punishment of offenders, and even when they do, domestic, not international enforcement is the rule.[232]

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[225] *See id. See also* Walter Kälin, *The Struggle Against Torture,* 324 INT'L REV. RED CROSS 433, 441 (1998) (discussing the mandatory mechanisms and decisions of European Court of Human Rights).

[226] International Covenant on Civil and Political Rights, *supra* note 134, art. 40(2).

[227] R. Wieruszewski, *Application of International Humanitarian Law and Human Rights Law: Individual Complaints, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 444-45 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989) (discussing methods of implementation of Human Rights law).

[228] *See* Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law, supra* note 167, at 446 (discussing implementation strategies of Human Rights treaties).

[229] R. Wieruszewski, *Application of International Humanitarian Law and Human Rights Law: Individual Complaints, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 445 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989) (discussing the individual and non-governmental petition method).

[230] *Id.* at 446.

[231] Under the U.N. Convention Against Torture, article 4 requires states to prosecute offenders under national law. *See* International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 34th Sess., Supp. No. 51, art. 4 U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1987) (entered into force on June 26, 1987, and for the United States on Nov. 20, 1994).

[232] *Id. See also* Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law, supra* note 167, at 446 (discussing implementation strategies of Human Rights treaties); R. Wieruszewski, *Application of*

International Humanitarian Law and Human Rights Law: Individual Complaints, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 445 (Frits Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989).

D. Conclusion

The Law of War and Human Rights law are related but distinct disciplines.[233] Still Human Rights Law, the Law of War and their respective bodies and institutions have become central to the protection of minimum humanitarian standards.[234] "Through a process of osmosis or application by analogy, the recognition as customary of norms rooted in international human rights instruments has affected the interpretation and eventually, the status, of the parallel norms in instruments of international humanitarian law."[235] Historical, practical, and enforcement differences, however, continue to keep the two regimes distinct. The differences have resulted in gaps of coverage, specifically, application during internal armed conflicts.[236]

Developments in recent years have changed this situation. Because of the duplication between the areas of the law, a blurring of the lines between Human Rights

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[233] Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 23, at 416 ("A technical and cultural gap separated these branches of the law which the vicissitudes of two very different path has happened to bring relatively close to each other within the body of international law.").

[234] *See* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505 (1998) (exploring a human rights body applying the Law of War); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 253 (2000) (discussing a Law of War body applying human rights).

[235] Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (discussing the direction of the Law of War as "driven to a large extent by human rights."). Both the Yugoslavia Tribunal and the Rwanda Tribunals provide a wealth of material showing criminal tribunals applying humanitarian law based on human rights law. *See id.*

[236] *See* Djamchid Momtaz, *The Minimum Humanitarian Rules Applicable in Periods of Internal Tension and Strife*, 324 INT'L REV. RED CROSS 455, 457 (1998) (discussing the shortcomings for protection of human rights in cases of internal violence); Burgos, *supra* note 85, at 3 ("Neither of the legal regimes, each designed with one of the two conditions in mind (peace and war), deals effectively with the particular characteristics of internal conflicts.").

and the Law of War has occurred as each is applied in an attempt to cover these gaps.[237] This overlapping application is creating an emerging body of law for internal armed conflict.

This Law of Internal Armed Conflict is comprised of parts of the Law of War, specifically Common Article 3; and Protocol II; sections of Human Rights law that survive even in time of a public emergency which threatens the life of a nation; and portions of other treaties governing warfare during all armed conflicts. In humanizing and tempering the harshness of battle normally governed by the Law of War, ideas from Human Rights law have found resonance.[238] But rather than a confusing blend of various bodies of law, this confluence is creating the Law of Internal Armed Conflict.

In this respect, it seems reasonable to expect that the Law of Internal Armed Conflict will continue to be influenced by developments in the Law of War and Human Rights Law. This influence will likely serve all parties beneficially and contribute to the reaffirmation and development of protections for actors in all conflicts. Separately, these

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[237] *See* CHADWICK, *supra* note 70, at 5 (defining international humanitarian law as a combination of the Law of War and certain human rights law); Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462, 468 (1998). Professor Meron noted that the "probable inclusion in the International Criminal Court Statute of Common Article 3 and crimes against humanity, the latter divorced from a war nexus connotes a certain blurring of international humanitarian law with human rights law and thus an incremental criminalization of serious violations of human rights." *Id.* (note this inclusion has since occurred). *See also* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing the criminal nature of Common Article 3), *reprinted in* 35 I.L.M. 32 (1996).

[238] Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law,* , 90 AM. J. INT'L L. 238, 262 (1996) (discussing how the applications of human rights by human rights bodies have influenced Law of War tribunals). *See also* Prosecutor v. Tadic, No. IT-94-1-AR72, paras. 110-11 (Oct. 2, 1995) (discussing historic human rights instruments as providing protections in internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996).

legal regimes deal ineffectively with the particular characteristics of internal armed conflicts. Yet their common theoretical rationale and many of their respective rules are creating a third legal regime that can regulate internal armed conflicts, the Law of Internal Armed Conflicts. The task now is to continue to articulate this integrated legal regime.

IV. The Future of the Law of Internal Armed Conflict

> *The legislative and executive branches may sometimes err, but elections and dependence will bring them to rights. The judiciary branch is the instrument which working like gravity, without intermission, will press us at last into one consolidated mass.*[239]

International law has traditionally been concerned with relations between sovereign states, but it is equally true that international law has long had an interest in promoting minimum standards in the conduct of hostilities and in the treatment of persons involved in them.[240] Some of the rules devised internationally now apply to internal armed conflicts.[241] This new body of law, the Law of Internal Armed Conflict, however, remains relatively undeveloped.

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[239] Thomas Jefferson, *quoted in* CITIZEN JEFFERSON 62 (John P. Kaminski ed., 1994).

[240] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (discussing the humanization of the Law of War).

[241] *See* discussion *supra* Section II.B (Finding the Law of Internal Armed Conflicts).

Still, significant growth has occurred since its earliest inception as a part of the Law of War.[242] It has found nourishment in the migration of principles from Human Rights law.[243] Although, not fully formed, the Law of Internal Armed Conflict has steadily gained its own distinctiveness. Rather than staying confined in the customs and conventions of the Law of War or solely bound by Human Rights obligations, it is developing its own identity.

Having explored its past and present, it is appropriate to take a glance into its possible future. Specifically, where can development be anticipated and who might guide or enforce any development? Both questions help answer why the Law of Internal Armed Conflict should be primarily enforced domestically. The first question explores the growing criminalization of the Law of Internal Armed Conflict via custom and conventions. The second question explores enforcement mechanisms for the Law of Internal Armed Conflict, and demonstrates the willingness of a broad range of bodies to participate in its enforcement. With this information, it is possible to analyze more completely the role of domestic tribunals in the criminalization and enforcement of the Law of Internal Armed Conflict

[242] *See* discussion *supra* Section II.A (Applicability of the Law of War).

[243] *See* discussion *supra* Section III (Confluence or Confusion: A River from Two Streams).

A. Criminalization of the Law of Internal Armed Conflict

1. Criminalization via Customary International Law

The criminalization of the Law of Internal Armed Conflict through customary international law norms will substantially impact its enforcement. For example, any state may intercede on behalf of an individual against another state that violates a legal principle grounded in customary international law and bring a claim *ergo omnes* (in relation to all states).[244] Some of the Law of Internal Armed Conflict may have already achieved this customary international law status.[245]

To date, perhaps the appeals chamber in the *Tadic* decision did the most conspicuous customary law analysis of the criminalization of Common Article 3, a part of the Law of Internal Armed Conflict.[246] The appellate chamber looked to historic and current internal armed conflicts ranging over Spain, Congo, Biafra, Nicaragua, El Salvador, Liberia, Georgia, and Chechnya.[247] In the *Tadic* decision, the appellate

[244] *See* RESTATEMENT (THIRD), *supra* note 20, § 703 (discussing remedies for violations of Human Rights obligations).

[245] *See* discussion *supra* Section II.B.2 (Customary Law of Internal Armed Conflict).

[246] Prosecutor v. Tadic, No. IT-94-1-AR72 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996). The appellate chambers did not use the term Law of Internal Armed Conflict, but relied heavily on Common Article 3, Protocol II and non-derogable human rights as reflected in customary law. *Id.* As discussed *supra* Section II, these sources form a substantial part of the Law of Internal Armed Conflict.

[247] *Id.* paras. 97, 100, 105, 106, 113-115 (discussing application of the Law of War in various civil wars).

chamber explored the two parts of customary law, state practice and *opinio juris*.[248] A fair reading of the decision demonstrates a heavier emphasis on *opinio juris*.[249] The appellate chamber relied on *opinio juris* as compensation for the scarcity of supporting state practice.[250]

As *opinio juris* supporting the customary character of the norms applicable to internal armed conflict, the appellate chamber invoked statements by governments and parliaments, resolutions of the League of Nations and the United Nations General Assembly, instructions by Mao Tse-tung, and the International Court of Justice decision in the *Nicaragua* case.[251] Additional evidence of *opinio juris* identified by the appellate chamber included the Nigerian army's operational code of conduct, statements by warring parties (the Farbundo Marti Front for National Liberation in El Salvador), statements of the European Community, the European Union and the U.N. Security Council, military manuals, the Declaration of Minimum Humanitarian Standards, and a national judgment (of the Supreme Court of Nigeria).[252] The chamber concluded all this *opinio juris* supported the customary criminalization of Common Article 3.[253]

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[248] *Id.* para. 99 (discussing the use of customary law for the purpose of regulating civil strife).

[249] *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 239-40 (1996) (discussing the methodology of the *Tadic* appellate chamber's opinion).

[250] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 99 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996). *See also* RESTATEMENT (THIRD), *supra* note 20, § 102 (regarding sources of customary law).

[251] Prosecutor v. Tadic, No. IT-94-1-AR72, paras. 100-102, 108 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

[252] *Id.* paras. 108-122.

[253] *Id.* para. 134 (concluding that "customary international law imposes criminal liability for serious violations of Common Article 3").

As for state practice, the appellate chamber noted that in examining evidence "with a view to establishing the existence of a customary rule or general principle, it is difficult, if not impossible, to pinpoint the actual behavior of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behavior."[254] The chamber explained this difficulty resulted from the limited access to the conflict by independent observers (even to the International Committee of the Red Cross), and that parties to the conflict may withhold information or release misinformation to effect the enemy, public opinion and foreign governments.[255]

In examining the current customary status of the Law of War applicable in internal armed conflicts, the *Tadic* appellate chamber, in effect, briefly outlined the emerging Law of Internal Armed Conflict. The chamber concluded that Common Article 3 has been criminalized.[256] In addition, it concluded that certain "prohibitions of means of warfare proscribed in international armed conflicts and ban of certain methods of

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[254] *Id.* para. 99. *But see* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 240 (1996) ("One may ask whether the Tribunal could not have made a greater effort to identify actual state practice."). Professor Meron posits that perhaps in choosing its sources, the "Tribunal appears to have followed Richard Baxter's insightful conclusion that '[t]he firm statement of the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the action of that country at different times and in a variety of contexts.'" *Id.* at 241 (quoting Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 42 BRIT. Y.B. INT'L L. 275, 300 (1965-66)). Professor Meron concludes that "such [state] statements are not to be equated to custom jure gentium but are an important element in the formation of custom." *Id.*

[255] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 99 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

[256] *Id.* para. 134 (concluding that "customary international law imposes criminal liability for serious violations of Common Article 3").

conducting hostilities" also applied to internal armed conflicts.[257] The appellate chamber did limit its conclusions to "serious" violations of Common Article 3 and these other prohibitions.[258] Its actions, however, show that criminalizing the emerging Law of Internal Armed Conflict via customary law is definitely viable and in fact may already be taking place.[259]

While not disputing the chamber's conclusion that the actual conduct of belligerents in the field may be the most reliable evidence of state practice, perhaps the training, education and disciplining of a state's soldiers should not be discounted as reliable evidence of state practice. In fact, some of the evidence identified by the appellate chamber as *opinio juris* may also show state practice as it evidences conduct. For example, the application of the Nigerian army's operational code of conduct implementing Common Article 3, to the court-martial, sentence and execution of Nigerian service members for conduct during an internal armed conflict is evidence of state practice.[260] Similarly, other domestic prosecutions of service members for conduct

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[257] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 127 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996). *But see* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 241-42 (1996) (Although, agreeing with the chamber's legal conclusions, Professor Meron concludes that chamber's list of rules applicable to internal armed conflicts may be over inclusive.).

[258] *Id.* para. 134. The chamber also limited its hold by stating that "only a number of rules and principles governing international armed conflicts have gradually been extended to internal armed conflicts," and that the extension does not consist of a full and mechanical transplant, but of just "the general essence of those rules." *Id.* para. 126. *But see* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 240-41 (1996). Professor Meron notes that these caveats are important but do not make it much easier to identify those rules and principles which have already crystallized as customary law. *Id.*

[259] "To determine *opinio juris* or acceptance as law in this field, it is necessary to look at both physical behavior and statements." Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 243 (1996) (discussing what law of war may be applicable to internal armed conflict).

[260] *Id.* para. 106 (discussing two cases of Nigerian soldiers being executed).

occurring in internal armed conflicts are additional evidence of state practice.[261] Additionally, military training manual's as examples of how troops are trained and educated is evidence of state practice. [262]

The *Tadic* criminalization of the rules forming the Law of Internal Armed Conflict is not necessarily revolutionary.[263] The International Committee of the Red Cross in its study of the current state of the Law of War applicable to international and internal armed conflict also relies on custom as evidence of the criminalization of the norms underlying the Law of Internal Armed Conflict. Specifically, the International Committee of the Red Cross is looking at "the conduct of belligerents, [and] also the instructions they issue, their legislation; . . . military manuals; [and] general declarations on law."[264] Similarly, customary evidence of the criminalization of parts of the Law of Internal Armed Conflict can be found in various national military manuals and domestic

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[261] *See* United States v. McMonagle, 34 M.J. 825 (A.C.M.R. 1992); United States v. Finsel, 33 M.J. 739 (A.C.M.R. 1991) (prosecutions for firing weapons in the air above Panama City during Operation Just Cause); United States v. Mowris, No. 68 (Fort Carson & 4th Inf. Div (Mech) 1 July 1993), *discussed in* Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 17-18 (1994) (conviction of U.S. Army Specialist for killing a Somali national).

[262] *See* Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 42 BRIT. Y.B. INT'L L. 275, 282 (1965-66) (stating that military manuals may provide evidence of the practice of states). *See also* DEP'T OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998) (detailing implementation of law of war training throughout the department of defense).

[263] *Report of an Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia by Professor Tom Farer*, U.N. Security Council at 1, U.N.Doc.S/26351/Annex (1993) (discussing how the Law of War has developed into customary international law and is therefore applicable to internal armed conflict).

[264] REPORT ON THE FOLLOW-UP TO THE INTERNATIONAL CONFERENCE FOR THE PROTECTION OF WAR VICTIMS 6 (1995) (26th International Conference of the Red Cross and Red Crescent) (Commission I, Item 2, Doc. 95/C.I/2/2). *See also* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 244-48 (1996) (discussing the International Committee of the Red Cross' role in development of this area of law).

laws that treat violations of Common Article 3 as a basis for individual criminal responsibility.[265]

Other evidence of the growing criminal nature of the norms of the Law of Internal Armed Conflict through custom is abundant. For example, U.S. Ambassador Albright explained the U.S. understanding that the "laws or customs of war" that could be prosecuted encompassed "Common Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions."[266] Further evidence includes the U.S. statement "that serious violations of the elementary customary norms reflected in Common Article 3 should be the centerpiece of the International Criminal Court's subject matter jurisdiction with regard to non-international armed conflicts."[267] Additional evidence of custom might include the act of ratification by states of the proposed

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[265] FED. REP. GERMANY, HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL, para. 1209 (1992); CANADIAN FORCES, LAW OF ARMED CONFLICT MANUAL (Second Draft) at 18-5, 18-6 (undated); UK WAR OFFICE, LAW OF WAR ON LAND, AND BEING PART III OF THE MANUAL OF MILITARY LAW para. 626 (1958). *See also* DEP'T OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998) (detailing implementation of law of war training throughout the department of defense). In addition, the U.S. government has stated that "[t]he obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency." Letter of Submittal by Secretary of State to U.S. President on Additional Protocols to Geneva Conventions (Dec. 13, 1986) (on file with author).

[266] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 560 (1995) (quoting statement by U.S. Ambassador Albright Concerning, U.S. Position on Article 3 of Statute Creating International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/PV.3217 at 15 (May 25, 1993)).

[267] Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462, 466-67 (1998) (quoting the U.S. Statement Submitted to the Preparatory Committee on the Establishment of an International Criminal Court (Mar. 23, 1998).

elements of the International Criminal Court statute, criminalizing conduct during an internal armed conflict.[268]

This evidence of state practice and *opinio juris* supports the criminalization of the rules of the Law of Internal Armed Conflict.[269] This transformation is taking place in the general essence of the rules, and in some of their detailed regulations.[270] As greater international criminalization of the Law of Internal Armed Conflict through custom occurs, a greater push for the enforcement of these norms under the principle of *ergo omnes* may be expected.

Generally, the evolution of customary international law is slow. Treaty making, although not necessarily expeditious, may be faster. Still customary international law remains a legitimate method for criminalization of the law.[271] What remains to be seen is whether in the Law of Internal Armed Conflict, criminalization through the formation of

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[268] *See* Rome Statute, *supra* note 216, art. 8(2) c & e (criminalizing conduct in non-international armed conflicts). *See also* Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462, 466 (1998) (discussing the emerging understanding of the need to criminalize internal atrocities).

[269] *See* Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462, 463 (1998) (discussing how the Hague tribunal has given judicial imprimatur to serious violations of the Law of War in internal armed conflicts).

[270] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 126 (Oct. 2, 1995) (discussing the emergence of rules on internal armed conflicts), *reprinted in* 35 I.L.M. 32 (1996).

[271] Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law,* 90 AM. J. INT'L L. 238, 247 (1996) (developing the Law of War through custom is "enhanced by the meager prospects for the satisfactory development of the Law of War through orderly treaty making."). *But see* Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts,* 69 N.Y.U.L. REV. 916, 951-52 (1994) (discussing how customary international law is an unlikely vehicle for applying the Law of War to internal armed conflicts).

custom is faster, although less precise in content, than the criminalization of the law through treaty making.[272]

2. Criminalization via Conventional Law

Another avenue for criminalizing the Law of Internal Armed Conflict is through conventional law. There is movement in this area, notwithstanding the difficulties in criminalizing conduct through treaty making.[273] Additional Protocol II, while not a criminal statute, did expand and make more specific the basic guarantees of Common Article 3.[274] It then later served as a basis for the *Tadic* chamber to criminalize conduct in internal armed conflicts.[275] Similarly, a solution might be to recognize that the Law of Internal Armed Conflict is still lacking and simply draft another round of additional protocols. These new instruments, such as a multi-state declaration of those principles

[272] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (discussing the dampened prospects of extending protective rules to internal armed conflicts through treaty making).

[273] "The significance of developing humanitarian law through customary law is enhanced by the meager prospects for the satisfactory development of the law of war through orderly treaty making." Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 247 (1996).

[274] *See* Letter of Submittal by Secretary of State to U.S. President on Additional Protocols to Geneva Conventions (Dec. 13, 1986) (on file with author). *See also* discussion *supra* Section II.B.1.b (Additional Protocol II of the Geneva Convention).

[275] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 117 (Oct. 2, 1995) (discussing Protocol II as having crystallized into emerging customary law), *reprinted in* 35 I.L.M. 32 (1996).

that are the minimum standards applicable in an internal strife, might be the first step for a future Protocol III or some other binding instrument.[276]

Historically though, international lawmaking and various diplomatic conferences have chosen not to comprehensively criminalize the protective rules applicable to civil wars.[277] States consistently refused to incorporate provisions that would apply the full Geneva Conventions to internal armed conflicts.[278] Concerns regarding state sovereignty, legal recognition of insurgents, and combatant immunity will need to be addressed before any wholesale revisions to the Geneva Conventions are possible.[279] In addition, because treaties or declarations are often made by consensus, in fashioning "generally acceptable texts, even a few recalcitrant governments may prevent the adoption of more enlightened provisions."[280]

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[276] Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U.L. REV. 916, 951-52 (1994) (discussing the need for the U.N. General Assembly to pass a declaration calling on states to incorporate the Geneva Convention into their internal laws); Burgos, *supra* note 85, at 25 (suggesting the remedy lies in more effective enforcement and also through new instruments). *See, e.g.,* Declaration of Minimum Humanitarian Standards, *adopted at* Abo Akademi University Institute for Human Rights in Turku/Abo, Finland (December 2, 1990) (non-binding declaration made at international conference as a model that states could adopt), *reprinted in* 89 AM. J. INT'L L. 218-223 (1995).

[277] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (discussing the dim prospects of extending protective rules to internal armed conflicts through treaties).

[278] *See* René Kosirnik, *The 1977 Protocols: a Landmark in the Development of International Humanitarian Law*, 320 INT'L REV. RED CROSS 483, 485 (1997) (discussing the state parties reluctance to "extend to rebel forces the same rights and obligations of those accorded to the regular forces of enemy states"); Jean de Preux, *The Protocols Additional to the Geneva Conventions*, 320 INT'L REV. RED CROSS 473, 481 (1997) (discussing state concerns of sovereignty affecting the scope of obligations in internal armed conflicts).

[279] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (discussing how state insistence on maximum discretion has limited the application of the Law of War to internal armed conflicts).

[280] *Id.* at 555.

Still, the proposed elements of crimes under the International Criminal Court statute may serve to criminalizing the Law of Internal Armed Conflict.[281] Whether the ratification of the International Criminal Court Statute occurs remains to be seen.[282] If ratified it would be the most complete conventional criminalization of the Law of Internal Armed Conflict.[283] It would include twenty-five specific crimes for an internal armed conflict.[284] Additionally, a court created under this statute could choose in the future to further develop the Law of Internal Armed Conflict through its inherent judicial powers.[285]

Additional conventions represent a solution to criminalizing the Law of Internal Armed Conflict. The resources, time and consensus needed to implement such a process are significant. The recent passage, however, of the International Criminal Court with its proposed elements of crimes in non-international armed conflicts may yet represent a

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[281] *See* Rome Statute, *supra* note 216, art. 8(2)c & e (criminalizing conduct in non-international armed conflicts).

[282] The Rome Statute of the International Criminal Court will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession. To date 139 countries have signed and twenty-nine have ratified the treaty. *See* International Criminal Court, *Ratification Status*, *at* http://www.un.org/law/icc/statute/status.htm (last visited Mar. 20, 2001).

[283] *See* Gregory P. Noone & Douglas W. Moore, *An Introduction to the International Criminal Court*, 46 NAV. L. REV. 112 (1999) (discussing the creation and general nature of the court); Michael N. Schmitt & Peter J. Richards, *Into Uncharted Waters, The International Criminal Court*, 369 NAV. WAR COLL. REV. 93 (2000) (offering a primer on the International Criminal Court covering its development and structure).

[284] *See* Rome Statute, *supra* note 216, art. 8(2) c & e (including crimes such as murder, mutilation, cruel treatment, torture, taking hostages, attacking civilians, rape, pillage, sexual slavery, enlisting children and denying quarter).

[285] *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 247 (1996) (discussing international criminal tribunals, Professor Meron notes the court's role "in the interpretation and application of jurisdictional provisions of their statutes").

successful example of criminalization of the Law of Internal Armed Conflict along conventional lines.

3. Conclusion

Any definitive outcome on the future criminalization of the Law of Internal Armed Conflict is uncertain. Clearly though, criminalization is occurring via customary international law. Conventionally, the future ratification of the International Criminal Court, criminalizing some conduct in internal armed conflicts, may also serve to further criminalize the Law of Internal Armed Conflict.

Until recently, the Law of War applicable to internal armed conflict did not have a basis for international criminalization.[286] Rather it was "asserted that the normative customary law rules applicable in non-international armed conflicts do not encompass the criminal elements of war crimes."[287] In fact, just eight years ago, the International Committee of the Red Cross in its comments on the proposed draft statute for the Yugoslavia tribunal concluded that "according to [the Law of War] as it stands today, the

[286] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 559 (1995) (citing Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, 30 INT'L REV. RED CROSS 409, 414 (1990) ("IHL applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty for violations.")). *See also* discussion *supra* Section IV.A (Criminalization of the Law of Internal Armed Conflict).

[287] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 559 (1995) (discussing the growing criminality of humanitarian law).

notion of war crimes is limited to situation of international armed conflict."[288] Similarly, the United Nations War Crimes Commission took this position as late as 1994.[289] The landscape has changed significantly since then with judgments from tribunals in Yugoslavia[290] and Rwanda,[291] as well as the passage of the International Criminal Court statute with proposed elements of crimes for internal armed conflicts.[292]

On all accounts, evidence continues to mount in favor of fundamental norms of behavior, such as represented by the Law of Internal Armed Conflict, applying to all conflicts. The unwillingness to apply any kind of international jurisdiction over internal armed conflicts is gradually giving way to the establishment of universal criminal jurisdiction over any kind of conflict.[293] "International law [is] increasingly render[ing] individuals accountable for violations of the most basic humanitarian rules."[294] The

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[288] *Id.* at 559 (citing unpublished comments of the International Committee of the Red Cross dated, March 25, 1993).

[289] *Report of United Nations High Commissioner for Refugees*, UN Doc. S/1994/674, annex, para. 42 (1994) ("the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification"), *cited by* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 559 (1995) (discussing the criminalization of humanitarian law).

[290] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (discussing individual criminal responsibility in an internal armed conflict), *reprinted in* 35 I.L.M. 32 (1996).

[291] Prosecutor v. Akayesu, Judgment, No. CTR-96-4-T (Sept. 2, 1998) (conviction for crimes against humanity and genocide, but no conviction for Common Article 3), *summarized in* 37 I.L.M. 1401 (1998).

[292] *See* Rome Statute, *supra* note 216, art. 8(2) c & e (elements for crimes in non-international armed conflict).

[293] Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462 (1998) (discussing that international investigations and prosecutions of Law of War violations are possible and credible).

[294] Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View,* 93 AM. J. INT'L L. 302, 316 (1999). *See also* Prosecutor v. Tadic, No. IT-94-1-AR72 (OCT. 2, 1995) (finding individual criminal responsibility in an internal armed conflict), *reprinted in* 35 I.L.M. 32 (1996); Prosecutor v. Akayesu, Judgment, No. CTR-96-4-T (Sept. 2, 1998)

international criminalization via custom and convention of the Law of Internal Armed Conflict continues.[295]

B. Enforcement of the Law of Internal Armed Conflict

Despite this trend to criminalize violations of the Law of Internal Armed Conflict, it remains to be seen who will enforce it. Like any other international law regime, a wide variety of non-coercive and coercive measures exist to deal with violations of the law.[296] A partial list of enforcement measures that may induce the parties to a conflict to obey and enforce the Law of Internal Armed Conflict include,

-consideration of public opinion;
-reciprocal interest of parties to the conflict;
-maintenance of discipline;
-fear of reprisals;
-penal and disciplinary measures;
-fear of payment of compensation;
-activities of protecting powers;
-international fact finding;
-activities of International Committee of the Red Cross;
-diplomatic activities;
-domestic implementing measures;
-dissemination of the law;

(prosecution for crimes against humanity in an internal armed conflict), *summarized in* 37 I.L.M. 1401 (1998).

[295] *See* Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462, 463 (1998) (The Law of War has "developed faster since the beginning of the atrocities in the former Yugoslavia than in the four-and-a-half decades since the Nuremberg Tribunals and the adoption of the Geneva Conventions."). *See also* discussion *supra* Section IV.A (Criminalization of the Law of Internal Armed Conflict).

[296] *See* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts,* 6 DUKE J. COMP. & INT'L L. 11, 14 (1995) (discussing a variety of possible methods to enforce the Law of War).

-personal conviction and responsibility of the individual.[297]

Neither exclusive nor complete, this list does illustrate the broad spectrum of enforcement measures available.[298] The current enforcement regimes, however, are still viewed as less than adequate.[299] The most often raised complaint regarding these regimes is the lack of enforcement, or perhaps more precisely, effective enforcement.[300] This part examines human rights bodies, international criminal tribunals, and Security Council actions under Chapter VII, as possible enforcement regimes. Finally, the work of non-governmental organizations is briefly considered. Which, if any of these is most effective is unresolved, but what becomes clear is that an international solution is not the universal remedy.

1. Enforcement via Human Rights Bodies

The role of the judicial, quasi-judicial, or supervisory bodies such as the European Court of Human Rights, European Commission of Human Rights, the Inter-American

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[297] DIETER FLECK ET AL., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 525 (1995).

[298] *See* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts,* 6 DUKE J. COMP. & INT'L L. 11, 14 (1995) (discussing additional methods to implement the Law of War).

[299] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321 (2000) (discussing the impotence of the current ad-hoc tribunals and suggesting that the International Criminal Court be provided even broader powers); CHADWICK, *supra* note 70, at 202-03 ("The Yugoslav War Crimes Tribunal remains controversial and there are many doubts regarding its ultimate success.").

[300] *See* Hampson, *supra* note 89, at 69 ("The great weakness of both Protocol II and [Common] Article 3 is the enforcement system"). *See also* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 14 (1995) (excellent discussion of a variety of enforcement regimes).

Court of Human Rights, Inter-American Commission of Human Rights, and the U.N. Human Rights Committee, among other Human Rights bodies, deals primarily with the interpretation of the provision of the treaties establishing such bodies.[301] "Interpretations of human rights conventions by quasi-judicial or supervisory bodies affect the internal and external behaviors of states."[302] These Human Rights bodies assist in implementing Human Rights treaties between states by investigating, monitoring and reporting violations to member states.[303]

Human Rights bodies in trying to accomplish their goals are turning to Law of War regimes.[304] The anomaly of Human Rights bodies relying on the Law of War can be explained by the emergence of the Law of Internal Armed Conflict, which includes human rights legal regimes. Each case will depend of course on which Human Rights body is involved or the facts and circumstances of the case. The possibility, however,

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[301] *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 100 (1989) ("[T]he decisions of such organs are frequently and increasingly invoked outside the context of their constitutive instruments and cited as authoritative statements of human rights law.").

[302] *Id.* ("They shape the practice of states and may establish and reflect the agreement of the parties regarding the interpretation of a treaty.").

[303] *See* International Covenant on Civil and Political Rights, *supra* note 134, arts. 40-42 (discussing the role and responsibilities of the UN Human Rights Committee); American Convention on Human Rights, *supra* note 134, § 2 art. 41 (establishing the functions of the Inter-American Commission on Human Rights); European Convention for the Protection of Human Rights, *supra* note 134, art. 19 (establishing European Court of Human Rights to ensure observance of convention). *See also* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 174 (1996) ("[T]he most prevelant technique for implementing human rights treaties [are] periodic reporting and review by treaty bodies.").

[304] *See, e.g.*, IACHR, Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, Oct. 30, 1997 (Inter-American Commission on Human Rights)(for additional discussion see text *infra* note 306); 1990 REPORT ON COLOMBIA BY SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY AND ARBITRARY EXECUTION para. 50 (1990) (C/CN.4/1990/22/Add.1) (discussing that Colombian military failed to comply with the Law of War by engaging in violence against civilian population). *See also* Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481, 502 (1998) (discussing the increasing application of the Law of War by UN Human Rights mechanisms).

that Human Rights bodies will reach beyond their Human Rights treaties and draw on the principles of the Law of War merits examination.

A decision by the Inter-American Commission on Human Rights[305] (*Tablada* Commission) illustrates this possibility.[306] Rising out of an attack on an Argentinian military barracks by insurgents, this Human Rights body decision also demonstrates the emergence of the Law of Internal Armed Conflict and a possible avenue of enforcement.[307] In concluding that it had jurisdiction to hear claimed violations of the Law of War by Argentina, the *Tablada* Commission typified the struggle to superimpose international standards on a purely domestic situation.[308] Most remarkable is that a

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[305] The Inter-American Commission of Human Rights is established under Article 33 of the American Convention on Human Rights. *See* American Convention on Human Rights, *supra* note 134, art. 33 (establishing the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights).

[306] IACHR, Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997, *available at* http://www.cidh.oas.org/annualrep/97eng/97encontan.htm [hereinafter *Tablada* Commission]. The case arose from a 23 January 1989 attack by forty-two armed persons on an Argentinean infantry barracks in La Tablada, Argentina. The subsequent battle lasted approximately thirty hours and resulted in the deaths of twenty-nine of the attackers and several soldiers. After the attack, state agents participated in the execution of four attackers, the disappearance of six attackers, and the torture of a number of others. The surviving attackers filed a complaint with the Commission alleging violations by state agents of the American Convention on Human Rights and the Law of War. The Commission found Argentina responsible for violating the right to life, the right to humane treatment, the right to appeal a conviction to a higher court, and the right to a simple and effective remedy. The Commission recommended that Argentina conduct a full investigation into the events and identify and punish those responsible. It further recommended that Argentina take the necessary steps to make effective the judicial guarantee of the right to appeal and repair the harm suffered. *Id. See also* Richard J. Wilson, *The Index of Individual Case Reports of the Inter-American Commission on Human Rights: 1994-1999,* 16 AM. U. INT'L L. REV. 353, 533 (2001); Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505 (1998).

[307] The Commission characterized the claim as based on the Law of War: however, given the mixed nature of the claim (aspects of the Law of War and of Human Rights Law); that the claim did not involve international armed conflict, so as to trigger the Law of War; and that the nature of the claim was violation of due process under Common Article 3, it might be just as accurate to term the claim as based on the Law of Internal Armed Conflict.

[308] *See* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505 (1998).

regional inter-governmental human rights treaty body concluded it was competent to consider Law of War violations.[309]

Ultimately, the *Tablada* Commission concluded that Argentina did not violate the Law of War.[310] Still, the Commission relied on the Law of War because it enhanced its ability to respond to a situation of internal armed conflict.[311] The *Tablada* Commission based its reach into the Law of War on five justifications.[312] First, it reasoned that the overlap of protections between the Geneva Conventions (specifically Common Article 3) and the American Convention on Human Rights provided the Commission competence to apply the Law of War.[313] Second, the *Tablada* Commission determined that the

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[309] *See Tablada* Commission, *supra* note 306, para. 157. The American Convention on Human Rights, which establishes the commission, describes its main function as promoting "respect for and defense of human rights." American Convention on Human Rights, *supra* note 134, art. 41. In the treaty establishing the commission no mention is made of the Law of War or the commission having any power to apply the Law of War. *Id.*

[310] *See Tablada* Commission, *supra* note 306, paras. 327-28 (concluding that Argentina was responsible for other human rights violations, but dimissing the Law of War claim).

[311] *See Tablada* Commission, *supra* note 306, para. 161. The commission concluded that the American Convention, although formally applicable in times of armed conflict, was not designed to regulate armed conflicts, so it needed to search for another basis, the Law of War. *Id.* para. 158.

[312] *See Tablada* Commission, *supra* note 306, para 157. *See also* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505 (1998).

[313] The *Tablada* Commission stated that

> [I]ndeed, the provisions of Common Article 3 are essentially pure human rights law. Thus, as a practical matter, application of Common Article 3 by a State party to the American Convention involved in internal hostilities imposes no additional burdens ... or disadvantages [to] its armed forces vis-à-vis dissident groups. This is because [Common] Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention.

Tablada Commission, *supra* note 306, para. 158, n.19. This reasoning is similar to that used in the Commentaries to the Geneva Convention. COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (Jean S. Pictet ed., 1958). *See also* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505, 508 (1998) (discussing how the similarity

American Convention on Human Rights required the parties to provide an effective domestic remedy to violations of the Law of War and that lacking such a remedy it had competence to provide one.[314] Third, it noted that under Article 29b of the American Convention on Human Rights it was required to give legal effect to treaties, like Law of War treaties, that had higher standards in these situations.[315] Fourth, the Commission noted that under Article 27 of the American Convention on Human Rights, even in emergencies state derogation measures must be consistent with a state's other international obligations, such as Law of War obligations.[316] Finally, the *Tablada* Commission relied on an advisory opinion by the Inter-American Court of Human Rights that declared that previously the Commission had properly invoked other laws and treaties.[317]

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of substantive norms between human rights and the law of war regimes, does not mean that supervisory bodies set up under one regime are competent to apply the rules of the other regime).

[314] *Tablada* Commission, *supra* note 306, para. 163.

[315] *Id.* para. 164.

[316] *Id.* paras. 168, 170. *See also* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505, 510 (1998) (discussing and agreeing with the strengths of this justification). If the Law of Internal Armed Conflict is grounded in customary international law, as discussed Section II.B., this would suggest that in fact a Human Right's body might be competent under its organic legislation to apply the Law of Internal Armed Conflict.

[317] *Tablada* Commission, *supra* note 306, para. 171. In its advisory opinion the Inter-American Court of Human Rights noted that on occasion the Commission had properly relied on other treaties and conventions relating to the protection of human rights. Advisory Opinion, Subject: "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), OC-1/82 of 24 Sept. 1982, Inter-Am.Ct. H.R. (Ser. A) No. 1, para. 42. This reasoning suggests that because the Commission had gone outside its cognizance correctly before, that justified its current foray.

Notwithstanding the legal merits of these arguments,[318] the willingness of this Human Rights body to exercise this authority suggests a possible enforcement mechanism for the emerging Law of Internal Armed Conflict.[319] This development could lead to future examinations of Law of War violations by this human rights body.[320] Given that this Commission has jurisdiction over the Americas, it is unlikely that in the future it will conclude that its decision in *Tablada* was incorrect. Petitions from other regional internal armed conflicts, such as in Colombia, or Peru could easily find their way to this body. Another possible effect of this case may be the encouragement to other human right bodies to extend their supervisory functions to violations that are part of the Law of Internal Armed Conflict.[321]

Additionally, other courts, commissions and international bodies examining alleged violations in an internal armed conflict might find the Commission's reasoning

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[318] *See* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505, 508-10 (1998) (discussing the strengths and weakness of each of the commission's arguments).

[319] *See* Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L. REV. RED CROSS 513, 529 (1998) (suggesting that the European Court of Human Rights accepted the Law of War into its jurisprudence).

[320] *See* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505 (1998) ("This decision may pave the way for future petitions."); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 100 (1989) ("Cumulatively, the practice of judicial, quasi-judicial and supervisory organs has a significant role in generating customary rules.").

[321] *See* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505, 506 (1998) (discussing the possible impact of this case). *See, e.g.*, Hampson, *supra* note 89, at 72 (suggesting that one approach the problem from the standpoint of Human Rights law and so the International Covenant on Civil and Political Rights could make use of the existing enforcement machineries, which on the universal level would be the U.N. Human Rights Committee).

persuasive.[322] Although the Law of War has appeared in the practice of other Human Rights bodies, no other Human Rights body has gone as far as the *Tablada* Commission and decided that it was competent to apply the Law of War.[323] Perhaps it is only a matter of time.

Whether other Human Rights bodies are suited to apply the Law of Internal Armed Conflict raises some valid questions. First, the different supervisory powers that exist among the various Human Rights bodies may lead to inconsistent approaches and standards.[324] For example, the U.N. Commission on Human Rights with is worldwide jurisdiction, as it stands has little if any control over internal conflict management, as the great majority of states have not accepted the competence of the Commission.[325] It also can consider only applications from states, except in the very few instances when states accept the right of individual application.[326] In comparison, the European Court on

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[322] *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 100 (1989) (discussing how the decision of these human rights bodies might affect state behavior, other bodies and eventually have a role in generating customary rules).

[323] Before the European Commission on Human Rights, Cyprus invoked the Law of War. *See* On an Inter-State Complaint Against Turkey, (Cyprus v. Turkey), 4 Eur. H.R. Rep. 482, 552-53 (1976). The European Commission, however, did not analyze this Law of War claim. *See* Christina M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Norms by Regional Intergovernmental Human Rights Bodies, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 31-67 (F. Kalshoven & Y Sandoz eds., Martinus Nijhoff Publishers, Dordrecht, 1989).

[324] *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 19 (1996) ("[E]ach of the structures has developed unique approaches to seeking assurance that the rights are put into practice.").

[325] *See* Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481, 499 (1998) (to date only fifty-three UN member states have accepted the U.N. Commission on Human Rights' jurisdiction).

[326] *See* R. Wieruszewski, *Application of International Humanitarian Law and Human Rights Law: Individual Complaints, in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 446 (F. Kalshoven & Yves Sandoz eds., Martinus Nijhoff Publishers 1989) (discussing the general lack of individual standing in the U.N. Human Rights system).

Human Rights has broad authority that includes the ability to hear applications from individuals, to award compensatory damages, and to make legally binding orders.[327] It is considered the most developed of the regional human rights bodies.[328] Similarly, the Inter-American Court on Human Rights has the authority to hear applications from individuals and to grant compensatory damage awards, but its ability to make legally binding orders is limited.[329]

Also most Human Rights regimes are designed to examine human rights violations by states against individuals.[330] In contrast, violations by dissident groups over individuals would have to be enforced by the very state that the dissident groups are opposing. This inherent unfairness might suggest a lack of legitimacy in the bodies'

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[327] *See* European Convention for the Protection of Human Rights, *supra* note 134, arts. 33, 41, 46 (creating right to individual application, compensatory damages and legally binding orders, respectively). *See also* Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L. REV. RED CROSS 513, 529 (1998) (suggesting that the European Court of Human Rights also accept the Law of War into its jurisprudence).

[328] *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 468 (1996) (comparing the various Human Rights regional bodies).

[329] *See* American Convention on Human Rights, *supra* note 134, arts. 44, 62, 63(1) (discussing that any person may lodge a complaint with the court, limited jurisdiction and compensatory damages, respectively).

[330] *See* RESTATEMENT (THIRD), *supra* note 20, § 701 (discussing the obligations to respect human rights as inuring to the state).

decisions.[331] Ultimately, these Human Rights bodies are left with the capacity to only govern one side of an armed conflict.[332]

Still, there is support for these Human Rights bodies using their procedures to take an active part in governing internal armed conflicts.[333] The effect of this active participation may be that they will "shape the practice of states and may establish and reflect the agreement of the parties regarding the interpretation of a treaty."[334] By drawing from the Law of War and moving beyond their Human Rights treaty basis, these bodies might develop the Law of Internal Armed Conflict and represent a possible enforcement mechanism, albeit with some significant challenges. Notwithstanding these challenges of differing standards of application, diverse jurisdictions and the inability to reach non-state actors, these bodies are increasingly willing to serve as forums for violations of the Law of Internal Armed Conflict.

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[331] *See* Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481, 501 (1998) (applying the Law of War by Human Rights bodies to reach non-state actors would reinforce the objectivity and impartiality of the system).

[332] *Id.* at 487 ("[H]human right standards cannot be applied to acts committed by private individuals or group."). *But see* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 24 (1996) (discussing human rights as reaching all actors by using Common Article 3, the Convention on Torture and various "terrorist" oriented regimes).

[333] *See* Hampson, *supra* note 89, at 72 (agreeing with the need for these bodies to take an active role); Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L. REV. RED CROSS 513, 529 (1998) (suggesting that the European Court of Human Rights accept the Law of War into its jurisprudence).

[334] THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 100 (1989).

2. Enforcement via International Criminal Tribunals

Another possible enforcement regime for the Law of Internal Armed Conflict is international criminal tribunals.[335] Increasingly, in the wake of an internal armed conflict, there is an emerging desire to establish international criminal tribunals to examine conduct.[336] Currently, international criminal tribunals have been set up by Security Council action.[337] The Security Council's ad-hoc international criminal tribunals represent an enforcement of the Law of Internal Armed Conflict. Additionally, although the International Criminal Court is still not activated, it is reasonable to expect it will also attempt to enforce the Law of Internal Armed Conflict with its detailed crimes for internal armed conflict.[338] The ability of other future criminal international tribunals to enforce the Law of Internal Armed Conflict will depend on their statutes.

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[335] Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462 (1998) (discussing the development of the Law of War in the wake of the current ad-hoc tribunals in Yugoslavia and Rwanda).

[336] *See* M. Cherif Bassiouni et al. *War Crimes Tribunals: The Record and the Prospects: Conference Convocation*, 13 AM. U. INT'L L. REV. 1383 (1998) (conference with various speakers including President Charles N. Brower, American Society of International Law, Dean Claudio Grossman, Washington College of Law, and The Honorable David J. Scheffer, former United States Ambassador-at-Large for War Crimes Issues, all supporting the increased use of international criminal tribunals); *Symposium on Method in International Law*, 93 AM. J. INT'L L. 291 (1999) (using various legal theories such as positivist, policy-oriented, international legal process to justify greater use of international criminal tribunals).

[337] For the Statute of the Yugoslavia Tribunal see S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827, *reprinted in* 32 I.L.M. 1202 (1993). For the Statute of the Rwanda Tribunal see S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955, *reprinted in* 33 I.L.M. 1602 (1994).

[338] *See* Rome Statue, *supra* note 216 art. 8(2) c & e (elements of crimes occurring in internal armed conflicts). *See also* Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462 (1998) (relying on U.S. Statement Submitted to Preparatory Committee of the Establishment of an International Criminal Court (March 23, 1998) (on file with Professor Meron) (discussing inclusion of war crimes to crimes occurring in internal armed conflicts). *See generally supra* note 282 (regarding status of ratification process of the Rome Statute).

If the Yugoslavia and Rwanda criminal tribunals, however, suggest a trend, then these future tribunals may encompass all parts of the Law of Internal Armed Conflict. For example, under the Yugoslavia statute, crimes against humanity could only be committed in either internal or international armed conflict. [339] Even some of the judges from the Yugoslavia tribunal felt that this narrow tailoring of the statute by the U.N. Security Council was narrower than necessary under customary international law.[340] This willingness to move towards greater criminal enforcement of the parts of the Law of Internal Armed Conflict is also illustrated in the dissent of Judge Abi-Saab of the Yugoslavia Tribunal, when he stated that the Yugoslavia Tribunal should go farther in extending the crimes applicable to internal armed conflict as a matter of customary international law.[341]

The Rwanda Tribunal statute removed this link of crimes against humanity with armed conflict. [342] In effect, criminalizing crimes against humanity in any domestic situation. The lack of a need for an armed conflict to trigger protection of individuals from state conduct is reminiscent of the situations that Human Rights protections govern.

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[339] Prosecutor v. Tadic, No. IT-94-1-AR72, paras. 140-41 (Oct. 2, 1995) ("crimes against humanity do not require a connection to international armed conflict"), *reprinted in* 35 I.L.M. 32 (1996)

[340] "Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all." *See id.* para. 141. *See also* Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462, 465 (1998) (discussing that the Yugoslavia Tribunal may not have gone far enough in criminalizing crimes against humanity); Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 242 (1996) (using the Tadic decision as proof that the distinction between international and internal armed conflict is decreasing).

[341] Prosecutor v. Tadic, No. IT-94-1-AR72, para. 128 (Oct. 2, 1995) (Judge Abi-Saab dissenting because court did not go far enough), *reprinted in* 35 I.L.M. 32 (1996).

[342] Prosecutor v. Akayesu, Judgment, No. CTR-96-4-T (Sept. 2, 1998) (conviction for crimes against humanity in a domestic situation), *summarized in* 37 I.L.M. 1401 (1998).

Arguably representing an example of a Law of War tribunal criminally enforcing a human rights protection.

In the future, the Security Council could decide to establish additional criminal tribunals over internal armed conflicts, as was done in Rwanda and Yugoslavia. The creation of such ad hoc international criminal tribunals may result in violations of the same humanitarian norms being accorded different treatment depending on the political will of the Security Council as expressed by the tribunal's statutes.[343] In addition, notwithstanding their statutory limitations, the activism of the current courts suggests that grounds for the enforcement of the Law of Internal Armed Conflict will continue to be found.[344] Finally, the International Criminal Court, although not yet activated has a proposed list of twenty-five specific crimes applicable to internal armed conflicts.[345] This court might also choose to further develop the Law of Internal Armed Conflict through its inherent judicial powers.[346]

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[343] *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal* Court, 10 HARV. HUM. RTS. J. 11, 60 (1997) (Professor Bassiouni discussing that "ad hoc tribunals generally do not provide equal treatment to individuals in similar circumstances who commit similar violations. Thus, such tribunals create the appearance of uneven or unfair justice, even when the accused are properly deserving of protection."); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (expressing concern for a system for selecting tribunals based on consensus of Security Council being obtained).

[344] *See* discussion *supra* note 246 and accompanying text.

[345] *See* Rome Statute, *supra* note 216, art. 8(2) c & e (including crimes such as murder, mutilation, cruel treatment, torture, taking hostages, attacking civilians, rape, pillage, sexual slavery, enlisting children and denying quarter).

[346] *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 247 (1996) (discussing international criminal tribunals, Professor Meron notes the court's role "in the interpretation and application of jurisdictional provisions of their statutes").

3. Enforcement via Security Council Activity

The Law of Internal Armed Conflict might be enforced by Security Council action. The Security Council's increasing focus on humanitarian concerns encourages this examination.[347] Much has been written regarding the scope of the Security Council's powers, but clearly an internal armed conflict of fairly wide extent and long duration might constitute a threat to international peace and security.[348] In this case, there is nothing to prevent the Security Council from acting in such a situation according to the provision of Chapter VII of the United Nations Charter.[349]

Because the Law of Internal Armed Conflict is international law, its violation alone might be used to justify Security Council intervention. Acting under Chapter VII, the Security Council could resolve that the law applies to all conflicts, international and

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[347] *See* Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U.L. REV. 916, 951 (1994) (arguing that this approach might "spur the international community into building consensus for the enhance protections of person" during an internal armed conflict through the passage of a Convention or another Protocol II similar device establishing an automatic enforcement mechanism)

[348] *See* Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 574 (1997) ("Internal acts can also be threats to international peace and security, as we have seen in a number of the cases with which the Security Council has been dealing."). *See also* Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U.L. REV. 916, 952-53 (1994) (discussing Security Council actions could further humanitarian interests).

[349] U.N. CHARTER art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.").

internal, on the basis that all conflicts threaten international peace and security.[350] Thus, opening the door to any future intervention.[351]

At this time, if the Security Council effectively legislated the entire spectrum of the law on all conflicts, internal and international, the international community would likely perceive the order as an illegitimate exercise of power.[352] Even if the Security Council limited itself to applying the Law of Internal Armed Conflict as a minimum level of protections for all participants, even this exercise of power might be seen as illegitimate. This type of action permits a small group of states to unilaterally impose their will on the community of nations and would undoubtedly not be accepted.[353]

Still, even within these limits, the Security Council has arguably acted in internal armed conflicts to enforce minimum humanitarian standards. For example the sending of

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[350] In effect, issuing general legislation rather than a mere injunction. The legality of this action is debatable. *See* Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 574 (1997) ("I must also conclude, limits on the Security Council's discretion are not juridical, and they cannot be adjudicated in court. The limits on the Security Council's discretion are political.").

[351] *See* Michael E. Smith, *NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination*, ARMY LAW. Feb. 2001, at 1 (reasoning that Security Council resolutions regarding Kosovo provided the legal justification for NATO intervention).

[352] *See* Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U.L. REV. 916, 955 (1994) (concluding that in addition, it is unlikely that the Security Council members would want to apply this standard to themselves).

[353] "Is the U.N. aspiring to establish itself as the central authority of a new international order of global laws and global governance? This is an international order the American people will not countenance." Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address Before the United Nations Security Council (Jan. 20, 2000), *available at* http://www.senate.gov/~foreign/2000/pr012000.html. Although Senator Helms agreed with the U.N. Secretary General's statement that the people of the world have "rights beyond borders," he reminded the Security Council that the sovereignty of nations must be respected. *Id.*

troops to East Timor,[354] the Northern Iraq no-fly zone,[355] or the use of force in Kosovo,[356] might all be seen as reactions to serious violations of the Law of Internal Armed Conflict. In effect, by its activism, the Security Council is enforcing the norms embodied by the Law of Internal Armed Conflict. This suggests that the Security Council with its broad range of sanctions can serve as a possible enforcement mechanism for the Law of Internal Armed Conflict.

In sum, greater enforcement of the Law of Internal Armed Conflict may come from Human Rights bodies, international criminal tribunals or the Security Council acting under Chapter VII authority. The legitimacy of the Law of Internal Armed Conflict will be reflected by the legitimacy of these enforcement actions. Still the activity by all these bodies demonstrates, not only the emergence of this new body of law, but also the growing willingness to enforce the rules of the Law of Internal Armed Conflict.

4. The Non-Governmental Organizations' Role

Before leaving the international arena and exploring the need to rely more on domestic institutions, a discussion of the work of non-governmental organizations in this

[354] *See* S.C. Res. 1264, U.N. SCOR, 4045th mtg. U.N. Doc. S/RES/1264 (2000) (Security Council resolution for East Timor), *reprinted in* 38 I.L.M. 232, 233.

[355] *See* S.C. Res. 688, U.N. SCOR, 2982nd mtg. (1991) (northern Iraq), *reprinted in* 30 I.L.M. 858; 140 CONG. REC. H1005 (1994) (report of President on use of force against Iraq discussing sanctions in response to human rights violations in northern Iraq against Iraqi citizens, and that these actions have reduced level of aggression against civilian populations).

[356] *See* S. C. Res. 1199, U.N. SCOR, 3930th mtg., U.N. Doc. S/RES/1199 (1998); S. C. Res. 1203, U.N. SCOR, 3937th mtg., U.N. Doc. S/RES/1203, (1998) (Security Council resolutions for Kosovo), *reprinted in* 38 I.L.M. 249, 250 (1999).

area is important. Their role has been both historic and increasingly frequent.[357] Typically, the making of international law is reserved to states and some intergovernmental organizations.[358] From the beginning of modern Law of War, however, non-governmental organizations have held a role in the process.

In particular, the International Committee of the Red Cross [ICRC] has had a substantial role in the growth and development of the Law of War.[359] This is in addition to its recognized status and functions under the Geneva Conventions and Additional Protocols.[360] Historically, the ICRC "right of initiative" has been the most extensive and historic method for ensuring the application of the Law of War.[361] This right allows the ICRC to visit and inspect to ensure that the parties are complying with their responsibilities under the Geneva Conventions.[362] Afterwards, the ICRC prepares and delivers a report to the inspected party. Unlike other non-governmental organizations'

[357] I THE LAW OF WAR, A DOCUMENTARY HISTORY, HUGO GROTIUS AND THE LAW OF WAR 1 (Leon Friedman ed., 1972) (for a detailed historical discussion of the role of the International Committee of the Red Cross); Michael N. Schmitt & Peter J. Richards, *Into Uncharted Waters, The International Criminal Court*, 369 NAV. WAR COLL. REV. 93, 125 n.1 (2000) (discussing the thirty-three intergovernmental organizations and 236 non-governmental organizations that participated in the Rome Conference).

[358] *See* RESTATEMENT (THIRD), *supra* note 20, § 103 cmt. c (discussing that international organizations generally have no authority to make law); George H. Aldrich & Christine M. Chinkin, *A Century of Achievement and Unfinished Work*, 94 AM. J. INT'L L. 90, 98 (2000) ("The relationship between NGOs and intergovernmental institutions remains contested and has been highlighted by the Secretary-General as one of the priorities for the United Nations as it moves into the new millennium.").

[359] *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 245 (1996) (discussing role of the ICRC in developing customary international law).

[360] *See* Geneva Conventions I-IV, *supra* note 42, art. 3 (discussing that "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the Conflict"); Additional Protocol II, *supra* note 110, art. 18 (discussing role of the Red Cross).

[361] Burgos, *supra* note 85, at 15 (discussing the juridical basis of the ICRC action known as the "right of initiative").

[362] *See id.*

reports, these reports are private between the ICRC and the party.[363] While traditionally, the ICRC has focused its efforts on the state parties to the internal armed conflict, increasingly it is visiting and inspecting rebel or insurgent group conduct.[364] At this time, however, there is no law requiring a state to agree to automatic ICRC visits to situations of internal armed conflicts.[365]

With its great prestige, the ICRC's continuing involvement in internal armed conflicts, and consequently, its recommendations regarding application of legal regimes in those conflicts has significant impact. Its decision to undertake preparing a report on customary rules of the Law of War applicable to international and internal armed conflicts will also effect the development of the law.[366] This report may become a restatement of customary Law of War, similar in impact as the ICRC's Commentary on the Geneva Conventions and the Additional Protocols.[367] In both aspects, criminalization

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[363] *See* Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481, 502 (1998) (discussing relationship between ICRC and United Nations bodies in applying the Law of War in internal armed conflicts).

[364] Press Release 00/37, International Committee of the Red Cross (Oct. 3, 2000), *available at* http://www.icrc.org/icrceng.nsf/Index (ICRC condemning grave breaches of the Law of War by the FARC insurgency group and the paramilitary groups in Colombia for executing wounded combatants during evacuations of wounded combatants.).

[365] *See supra* note 360. Common Article 3 only states that the ICRC "may offer its services," not that states must accept this offer. *Id. See also* Burgos, *supra* note 85, at 15 (discussing the potential political embarrassment of declining an ICRC visit).

[366] REPORT OF THE PRESIDENT OF THE INTERGOVERNMENTAL GROUP OF EXPERTS FOR THE PROTECTION OF WAR VICTIMS, 26TH INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT 2 (1995) (Conf. Doc. 95/C.I/2/I).

[367] Through its commentaries on the Geneva Conventions and Protocols, the ICRC influences state practice and thus, indirectly, the development of customary law. *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 245 (1996).

and enforcement, the ICRC has used quiet diplomacy to develop a reputation as a non-political body driven by humanitarian considerations.

Less subdued are the public condemnations, political pressure and public scrutiny by groups such as Amnesty International,[368] Human Rights Watch,[369] other non-governmental organizations and the multitude of media organizations.[370] Their reports serve as a catalyst for examining conduct in all armed conflicts. By investigating and publicizing the conduct of parties in internal armed conflicts, these groups spur the development of the Law of Internal Armed Conflict by mobilizing public interest, which in turn leads to state action. Their efforts have also resulted in some party compliance with the Law of Internal Armed Conflict to avoid this "public shaming."[371]

From private diplomacy to public reports, nongovernmental organizations attempt to show parties to a conflict that, even in cases of civil wars, combatants are not free to wage war with a total disregard for the sufferings of the affected population.[372] Although

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[368] For examples of Amnesty International condemnations, see Amnesty International website at http://www.amensty.org (visited Mar. 22, 2001) (some countries listed included Turkey, Jamaica, Burundi, and Russia).

[369] For examples of Human Rights Watch condemnations, see Human Rights Watch website at http://www.humanrightswatch.org (visited Mar. 22, 2001) (some countries listed included Congo, China, Israel, and the U.S.).

[370] For an example of media scrutiny, see Cable News Network, *In-depth Special Reports-Colombia, at* http://www.cnn.com/SPECIALS/2000/colombia.noframes (last visited Mar. 25, 2001) (reporting on internal armed conflict in Colombia).

[371] *See, e.g.,* Maria Cristina Caballero, *A Journalist's mission in Colombia: Reporting Atrocities is not Enough,* Special Report, CNN.com (n.d.) (interviewing paramilitary group leader attempting to justify his human rights violations), *at* http://www.cnn.com/SPECIALS/2000/colombia.noframes/story/essays /caballero/.

[372] Hampson, *supra* note 89, at 72.

lacking the traditional institutional role that the Human Rights bodies, the international criminal tribunals or the Security Council might have, nongovernmental organizations are taking part in the development of the Law of Internal Armed Conflict through their active participation in the political processes.[373]

C. Conclusion

The future of the Law of Internal Armed Conflict is uncertain, though two general observations can be made. First, the trend is to criminalize the Law of Internal Armed Conflict. The process by which the Law of Internal Armed Conflict is becoming binding on states is through conventional and customary law. In addition both its conventional and customary international law aspects are increasingly criminal. The recent passage of the International Criminal Court statute may yet embody a complete conventional criminalization of this law and will result in the Law of Internal Armed Conflict becoming binding on the signatories to the Rome Statute.[374] The role of custom in the criminalization of the law is evident in the decisions of both the Yugoslavia and Rwanda

[373] *See* George H. Aldrich & Christine M. Chinkin, *A Century of Achievement and Unfinished Work*, 94 AM. J. INT'L L. 90, 98 (2000) (discussing nongovernmental organizations' role as a U.N. identified priority).

[374] *See* Rome Statute, *supra* note 216, art. 8(2) c & e (elements of crimes occurring in internal armed conflicts). *See also* Gregory P. Noone & Douglas W. Moore, *An Introduction to the International Criminal Court*, 46 NAV. L. REV. 112 (1999) (discussing the history and creation of the International Criminal Court).

Tribunals.[375] While not yet binding on all states as *jus cogens*, the norms of the Law of Internal Armed Conflict continue to gain universal acceptance.

Second, there is an increasing willingness for international bodies to attempt to govern the conduct of internal armed conflicts. These enforcement mechanisms on states that fail to prosecute the Law of Internal Armed Conflict might include both Human Rights bodies examining conduct during internal armed conflicts by relying on the Law of War, and international criminal tribunals criminalizing Common Article 3, Additional Protocol II, and certain methods and means of warfare.[376] Also the humanitarian activism by the Security Council in response to violations of human rights and humanitarian norms may serve as a possible enforcement mechanism and continued expansion of the Law of Internal Armed Conflict. Finally, this increased international involvement in domestic matters includes the role of the non-governmental organizations investigating the Law of War and Human Rights conduct on all sides of the internal armed conflict.

The growing number of international bodies seeking to enforce parts of the Law of Internal Armed Conflict substantiates its emergence. In the future, the Law of Internal Armed Conflict will be increasingly criminalized, and because of its international nature,

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[375] Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law,* 90 AM. J. INT'L L. 238, 239 (1996).

[376] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 561 (1995).

the call for expanding the international enforcement of its penal aspects may continue to grow louder.[377]

V. Domestic Enforcement of the Law of Internal Armed Conflict

Law will never be strong or respected unless it has the sentiment of the people behind it.[378]

The Law of Internal Armed Conflict prohibits many of the atrocities that occur in internal armed conflicts. While the sociological, political or cultural reasons for such violations may lie beyond the reach of the law, the effective enforcement of the law might reinforce more humanitarian conduct.[379] Despite the trend to use international solutions to enforcement, a renewed emphasis on domestic enforcement of the Law of Internal Armed Conflict would better maximize humanitarian interests.[380]

Common Article 3, to a limited extent Protocol II, various treaties regulating the methods and means of warfare, and certain non-derogable Human Rights form the core of

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[377] *See* M. Cherif Bassiouni et al., *War Crimes Tribunals: The Record and the Prospects: Conference Convocation*, 13 AM. U. INT'L L. REV. 1383 (1998) (conference with various speakers including President Charles N. Brower, American Society of International Law, Dean Claudio Grossman, Washington College of Law, and The Honorable David J. Scheffer, former United States Ambassador-at-Large for War Crimes Issues, supporting the use of international criminal tribunals).

[378] THE LAWYER'S QUOTATION BOOK 32 (1992) (quoting James Bryce).

[379] *See* Hampson, *supra* note 89, at 72 (concluding that the weakness of the law lies in ineffective enforcement systems).

[380] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (discussing that the enforcement of the Law of War cannot solely depend on international tribunals).

the Law of Internal Armed Conflict.[381] Growth continues on both the scope and breadth of this law.[382] Its biggest challenge, however, may be its enforcement system.[383] Specifically, the complaint is that there is no independent enforcement mechanism; no body capable of making objective determinations of fact; or no mechanism by which a state or other party can be compelled to account for their conduct during an internal armed conflict.[384] Solutions explored include Human Rights bodies, international criminal tribunals and Security Council activism.[385] Often dismissed, however, is the enforcement mechanism inherent in domestic tribunals.[386]

In allocating the responsibility of enforcing the Law of Internal Armed Conflicts between national and international tribunals, much work remains to be done. In this section, some of that necessary work is explored. First, drawing from Sections II and III, this section discusses the need for a distinct legal regime, the Law of Internal Armed Conflict. Next, building on the analysis from Section IV, the weaknesses of international tribunals are explored. This section then examines the value domestic tribunals might

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[381] *See* discussion *supra* Section II (The Law of Internal Armed Conflict).

[382] *See* discussion *supra* Section III (Confluence or Confusion: A River from Two Streams).

[383] *See* Mark W. Janis, *International Courts and the Legacy of Nuremberg: The Utility of International Criminal Courts*, 12 CONN. J. INT'L. L. 161, 1704 (1997) (concluding that in dispensing justice the international criminal tribunals have been largely ineffective); Hampson, *supra* note 89, at 55, 72 (concluding that much work remains to secure enforcement of the Human Rights and Law of War in internal armed conflicts).

[384] *See* Hampson, *supra* note 89, at 71; Burgos, *supra* note 85, at 23 (both authors concluding that an international surveillance system with broader authority is necessary).

[385] *See* discussion *supra* Section IV (The Future of the Law of Internal Armed Conflict).

[386] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321, 329 (2000) (dismissing domestic tribunals based on the failures of the Leipzig trials following World War I and concluding that despite the failures of the Yugoslavia and Rwanda Tribunals, the solution lies in even greater authority and power to international tribunals).

have on the Law of Internal Armed Conflict. The conclusion reached is that fundamental universal standards embodied in the new legal regime exist, and the enforcement of the Law of Internal Armed Conflict exists is best accomplished domestically.[387]

A. The Need for a Distinct International Legal Regime

The need for an encompassing legal regime to govern internal armed conflict is apparent. As shown, the Law of War and Human Rights regimes are limited in their application, scope and enforceability. While aspects of each of these regimes are desirable, such as the establishment of minimum standards and the possibility of international enforcement, neither regime provides adequate protections in the context of internal armed conflict.[388] As stated so adeptly by one commentator, "What is needed is a uniform and definite corpus of international humanitarian law that can be applied apolitically to internal atrocities everywhere, and that recognizes the role of all states in the vindication of such law."[389]

The Law of Internal Armed Conflict is emerging as the answer. Its emergence is visible in the practice of various international bodies and states. For example, recognizing the limitations of Human Rights, which do not criminalize violations and may not apply

[387] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) ("[International Tribunals] will never be a substitute for national courts.").

[388] *See* Burgos, *supra* note 85, at 25 (discussing the inherent weaknesses of each legal regime to reach conduct in internal armed conflicts necessitates a new integrated legal regime).

[389] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995).

in times of national emergency, Human Rights bodies are looking to the Law of War to provide fundamental standards that are criminalized and cannot be abrogated.[390] Human Rights also remain tied to the relationship between individuals and their states, despite the need to reach non-state actors.[391] The Law of War provides the mechanism to reach these actors.[392]

Similarly, the Law of War is limited by its general application only to inter-state conflict.[393] It does not apply during peacetime or may be limited during times of internal armed conflict.[394] States also remain wary of the idea of legal status upon which so much

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[390] *See* discussion *supra* Section IV.B.1 (Enforcement via Human Rights bodies). *See also* Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L. REV. RED CROSS 513, 529 (1998) (suggesting that the European Court of Human Rights take this approach and accept the Law of War into its jurisprudence).

[391] *See* discussion *supra* Section III.B (Practical Differences). *See also* Current Developments, *The Fifty-fifth Session of the UN Commission on Human Rights*, 94 AM. J. INT'L L. 192 (2000) (deciding again to postpone a draft resolution on the application of human rights obligations to non-state actors); AMNESTY INTERNATIONAL, MUDDYING THE WATERS, THE DRAFT "UNIVERSAL DECLARATION ON HUMAN RESPONSIBILITIES": NO COMPLEMENT TO HUMAN RIGHTS (1998) (AI Index No. IOR 40/02/98) (stating position against applying Human Rights obligations to non-state actors), *available at* http://www.amnesty.org/ailib/index.html. *See generally* RESTATEMENT (THIRD), *supra* note 20, § 701 (discussing the obligations to respect human rights as inuring to the state); Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481, 487 (1998) ("[H]uman right standards cannot be applied to acts committed by private individuals or group.").

[392] *See* discussion *supra* Section III.B (Practical Differences). *See also* Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law*, *supra* note 167, at 445 ("in the final resort [the Law of War] contemplate[s] prosecution and punishment of those individuals who violate their norms.").

[393] *See* discussion *supra* Section II.A.2 (Triggering the Law of War).

[394] *See id.*

of the Law of War depends.[395] Whereas, Human Rights, based on a person's "humanness" is not tied to any legal status.[396]

The drive to reach the conduct regulated by the Law of Internal Armed Conflict is reflected in the recent passage of the International Criminal Court statute with its detailed crimes for internal armed conflicts.[397] In addition, whether through Security Council action, regional bodies or individually, the activism of states in responding to behavior during internal armed conflicts demonstrates the emergence of a new international legal regime.[398]

With the emergence of this new regime comes the next step of determining which body or bodies can most effectively enforce it. While many enforcement mechanisms exist, the call for international tribunals is often raised.[399] The reliance on domestic tribunals, however, remains the most effective means of enforcement. To understand why, the weaknesses of international tribunals are explored.

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[395] *See supra* text accompanying note 96 (discussing the concern for state sovereignty resulting in limitations found in Common Article 3).

[396] *See* discussion *supra* Section III.B (Practical Differences). *See also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 101 (1989) (discussing the differences between human rights law and other traditional field of international law).

[397] *See* Rome Statute, *supra* note 216, art. 8(2) c & e (criminalizing twenty-five specific crimes in internal armed conflicts).

[398] *See* discussion *supra* Section IV (The Future of the Law of Internal Armed Conflict).

[399] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321 (2000) (concluding that future international criminal tribunals will need greater powers to be successful); Mark W. Janis, *International Courts and the Legacy of Nuremberg: The Utility of International Criminal Courts*, 12 CONN. J. INT'L. L. 161 (1997) (concluding that future international criminal tribunals are needed).

B. Weaknesses of International Tribunals

The work of the two international criminal tribunals and the adoption of the Rome Statute of the International Criminal Court suggest a turning point in international law.[400] Conduct that is prohibited by the Law of Internal Armed Conflict "can now be prosecuted directly before international criminal tribunals without the interposition of national law."[401] It remains to be seen if the International Criminal Court may eliminate the need for establishing additional ad hoc international criminal tribunals.

Still, international criminal tribunal supporters argue that states should continue sacrificing more of their sovereignty for the noble cause of international justice.[402] While the need for international justice is not challenged, it must be remembered that what stopped the Nazi march across Europe, the Communist march across the world, and the Serbian march across Kosovo, was the principled projection of power by the world's democracies.[403] Strong, stable and legitimate democracies, not international criminal

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[400] Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462, 463 (1998) (discussing the cumulative impact the two ad-hoc international criminal tribunals have had on the development of the Law of War).

[401] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 253 (2000).

[402] "Outmoded traditions of state sovereignty must not derail the forward movement." Benjamin Ferencz, Address Before Rome Conference on International Criminal Court (June 16, 1998), *available at* http://www.un.org/icc/speeches/616ppc.htm (visited Mar. 22, 2001) (cited by Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is and the Way Ahead*, 41 VA. J. INT'L. 204 (2000)).

[403] Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address Before the United Nations Security Council (Jan. 20, 2000), *available at* http://www.senate.gov/~foreign/2000/pr012000.html.

tribunals, remain the surest way developed so far of ensuring the peace and the security of the world in the future.[404]

Yet a proliferation of international criminal tribunals continues. Recent examples include the establishment of the International Tribunals for the Former Yugoslavia and Rwanda, the International Criminal Court and the recent call for ad-hoc tribunals for Sierra Leone and Cambodia.[405] While this fervent drive to support the rule of law is admirable, the lack of uniform standards and differing procedures is a noted concern.[406] Of greater concern is the willingness of states to abrogate responsibilities to deal with their problems. In effect, the continued reliance on international criminal tribunals removes the responsibility of the state, as the unitary structure of social order, to ensure that violations do not occur.

Specifically, this reliance on international criminal tribunals suffers from three weaknesses. First is the valid concern of the potential politicization of prosecutions. Second, these international criminal tribunals weaken and de-legitimize already chaotic states. Finally, the credibility of the enforcement is debatable given the disenfranchisement of the local community. Ultimately, the benefits of international

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[404] *See* Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT'L. L. 86, 87 (2001) (discussing the strong forces in support of the democratic model for postconflict societies such as prestige, familiarity and economic prosperity).

[405] *U.N. Report of the Group of Experts for Cambodia, Pursuant to GA Res. 52/155* (Feb. 18, 1999) (recommending an ad hoc international tribunal to try Khmer Rouge officials); *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, para. 73, U.N. Doc. S/2000/915 (Oct. 4, 2000) (discussing international criminal tribunal for Sierra Leone with annex containing proposed statute).

[406] Report of Fifth Legal Advisers' Meeting at U.N. Headquarters in New York, 89 AM. J. INT'L L. 644, 647 (1995) (discussing the necessary problems that will need to be overcome in to establish an international criminal tribunal).

criminal tribunals will not outweigh the benefits of developing effective domestic enforcement mechanisms.[407]

1. Selective Political Enforcement

Any prosecution, whether municipal, national or international has the potential to become politicized. It is this very reason that commentators often deplore the use of national courts for the enforcement of international standards.[408] Similarly though, international criminal prosecutions can also be subject to political pressures.[409]

An example of this political pressure is the creation by the Security Council of the ad hoc international criminal tribunals for Rwanda and Yugoslavia.[410] These tribunals are a creation of non-representative political processes. They are imposed on the parties

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[407] *See* José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 462 (1999) (noting that increasing funds for the international tribunals diminishes the funds available for domestic tribunals). *But see* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 25 (2001) (responding that Rwanda courts had received substantial funds in excess of $30 million). Given that the International Criminal Tribunals have an annual budget of over $100 million, Professor Alvarez's observation may be more telling.

[408] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321, 342 (2000) (discussing that based on the failure of the Leipzig trials over seventy years ago the international community cannot trust domestic courts to render impartial justice); Burgos, *supra* note 85, at 3 ("large numbers of detains whose rights to procedural due process have been denied indicates the fallacy in relying upon national law to protect political prisoners").

[409] *See* Michael F. Lohr & William K. Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. LEG. STUD. 33, 47 (1999) (discussing the recent Libyan use of prosecutions against members of the Reagan administration).

[410] For the Statute of the Yugoslavia Tribunal, see S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827, *reprinted in* 32 I.L.M. 1202 (1993). For the Statute of the Rwanda Tribunal, see S.C. Res 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955, *reprinted in* 33 I.L.M. 1602 (1994).

to the conflict, notwithstanding their noble purpose.[411] As Rwanda learned, conflicts involving states with less political power may be more obliged to accept this jurisdiction, than states with more political power.[412]

The internal armed conflicts in Chechnya and Cambodia also provide examples. Because of Russia and China's position as permanent members of the Security Council, it is unlikely that an international criminal tribunal will ever be created to prosecute alleged crimes in either Chechnya or Cambodia.[413] However, similar conduct occurring in the former Yugoslavia or in Sierra Leon merits the creation of an international tribunal. Concern about "the selectivity involved in a system where the establishment of a tribunal for a given conflict depends on whether consensus to apply Chapter VII of the U.N. Charter can be obtained" is justifiable.[414]

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[411] Rwanda, ultimately cast the only negative vote at the Security Council against Resolution 955, which established the Rwanda Tribunal. At the time of the Resolution's passage, Rwanda was an at-large member of the Security Council. *See* Ambassador Manzi Bakuramutsa, *Identifying and Prosecuting War Criminal: Two Case Studies – the Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 646 (1995) (former Rwanda Ambassador to the UN).

[412] *See id.*

[413] *See* Kay Johnson, *Will Justice Ever be Served?*, TIMEasia.com, Apr. 10, 2000 (discussing that any Security Council attempt to force an international criminal tribunal on Cambodia would likely result in a Chinese veto), *at* http://www.time.com/time/asia/magazine/2000/0410/cambodia.html. Any Security Council attempt to impose an international criminal tribunal on Chechnya a province of Russia would also likely result in Russia exercising its veto.

[414] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995).

Supporters of international criminal tribunals nonchalantly guarantee that these tribunals will operate with restraint and unbiased interests.[415] Any prosecutorial decision, international or domestic, however, is subject to political pressure.[416] Enforcement at a domestic level, though, ensures that the lawmakers are the subjects of the law, rather than recipients of benevolent coercion from afar.[417] Greater pressure for domestic enforcement of the Law of Internal Armed Conflict remains the more valid objective.[418] Although, any prosecution is subject to politicization, removing the discretion from the state involved ensures that its interest are no longer served, while assuming that mankind's interests are served.[419]

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[415] *See The International Criminal Court, Setting the Record Straight, at* http://www.un.org/News/facts/iccfact.htm (modified last June 1, 1999) (explaining that because of internal checks and balances the International Criminal Court will be unbiased and that parties may object after an investigation has started).

[416] "The essence of government is power, and power lodged as it must be in human hands, will ever be liable for abuse." James Madison, Speech Before the Virginia State Constitutional Convention (Dec. 1, 1829). *See also* Michael F. Lohr & William K. Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. LEG. STUD. 33, 47 (1999) (discussing concerns with "trusting" that powerful institutions will operate with apolitical self-restraint).

[417] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321, 339-40 (2000) (recognizing the obstacle of "importing justice" and its effect on the legitimacy of the tribunal).

[418] *See, e.g., Colombia's Pastrana Says U.S. Aid Will Not Fan War*, REUTERS, Aug. 29, 2000 (shortly after the announcement of aid President Pastrana submitted legislation to the Colombian Parliament for domestic trials for allegations of abuses of human rights); *Milosevic Arrested*, CNN.com/World, Apr. 1, 2001 (reporting arrest of former Yugoslavian President on domestic charges to obtain the international aid needed to stave off popular unrest)

[419] *See* Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 342 (1997) (discussing the need for the Rwanda Tribunal to more aggressively market itself to the people of Rwanda to increase its legitimacy).

2. Adding Chaos to the Atrocities

To be sure there are repressive regimes whose destabilization might be advocated by those seeking international peace. At this time however, the international system recognizes the right of all states to be free from outside interference and intervention.[420] A state emerging from or engaged in an internal armed conflict is a chaotic situation at best.[421] This loss of self-control often results in atrocities.[422] Reducing the state further lessens the total governmental strength of the state, and the state is left with less and less ability to discharge or comply with its remaining duties. [423]

The state exists as the central organization of social life, but to be central it must be supreme in organizational power and legal authority.[424] When the capacity of legislative promulgation, judicial interpretation, and executive enforcement of criminal statutes is removed to an international organization, the state is further weakened.[425]

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[420] *See* U.N. CHARTER art. 2(7). "Member states agree to not become involved in other member states domestic affairs." *Id.*

[421] *See* AMNESTY INTERNATIONAL REPORT 2000, CAMBODIA (2000), *available at* http://www.amnesty.org (covering period from Jan. to Dec. 1999) (discussing on-going unrest in Cambodia and Cambodia's efforts to set up domestic tribunals for suspects of gross human rights violations).

[422] *See* AMNESTY INTERNATIONAL REPORT 2000, SIERRA LEONE (2000), *available at* http://www.amnesty.org (covering period from Jan. to Dec. 1999) (discussing the mutilations occurring as rebel factions were forced out of the capital of Freetown).

[423] *See* Rep. Hatton W. Sumners, Address Before U.S. House of Representatives (Feb. 1, 1940), *reprinted in* HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 751 (Sol Bloom ed., 1941) (discussing the effect upon democracy of loss of state sovereignty).

[424] *See* GERHART NIEMEYER, LAW WITHOUT FORCE, THE FUNCTION OF POLITICS IN INTERNATIONAL LAW 313 (1941) (discussing the notion of sovereignty in international law).

[425] All these activities (which seem to embody the very functioning of a state) are necessary for the effective functioning of an international criminal tribunal. *See* Mary Margaret Penrose, *Lest We Fail: The*

Removing this power from the state destroys what the declared enemies of the state could not, the government and the governmental capacity of the people, upon whom the capacity to govern absolutely depends.[426] In other words, either the state or the international criminal tribunal must have the central authority to function in a particular realm.[427] When both bodies are competing to exercise this authority, the result is added chaos to the atrocities. Although internal armed conflicts occur in many settings, including repressive and democratic regimes, the importance of nurturing self-sufficiency is vital to any long-term international stability.

3. Decreased Credibility of Judgment

A more effective enforcement mechanism is a reasonable goal. But if an international tribunal is to be effective, it should be an institution that reflects the community it represents through its judgments.[428] An intimate relationship between the lawmaking system and its subjects minimizes the likelihood that those subject to it will

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Importance of Enforcement in International Criminal Law, 15 AM. U. INT'L. L. REV. 321, 342 (2000) (discussing need for tribunal with broad powers).

[426] *See* Rep. Hatton W. Sumners, Address Before U.S. House of Representatives (Feb. 1, 1940), *reprinted in* HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 752 (Sol Bloom ed., 1941) (discussing the effect upon democracy of loss of state sovereignty).

[427] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321 (2000) (resolving this dilemma in favor of the international criminal tribunal). This neo-judicial colonialism, however, seems at odds with the idea of self-government embodied by the UN Charter. *See* U.N. CHARTER art. 2(7).

[428] The idea of a tribunal representing the community is not unusual. U.S. CONST. amend. VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

be motivated to violate the law.[429] "Their participation in the lawmaking process makes it likely that the law will reflect their collective interests, giving the law legitimacy and a strong pull toward compliance."[430]

When an international criminal tribunal is empowered, the primary subjects of the law are no longer the lawmakers themselves. In effect, the victims and community are disenfranchised from the process, even though they have the greatest interest in the enforcement.[431] As a result, the tribunal no longer represents the most interested community. The importance of community involvement in resolving the internal armed conflict cannot be overemphasized.[432] It is this challenge of re-building the society together which may serve to heal the rifts.[433] An international tribunal may represent the

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[429] *See* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 533 (1993) (discussing the evolution of international law and its current trend towards creating fundamental norms).

[430] *Id.*

[431] For example, the Rwanda Tribunal Statute only covers crimes for one year, despite Rwanda's objections that this limitation placed an artificial limitation on the crimes committed. *See* Statute for International Criminal Tribunal for Rwanda, S.C. Res 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1602 (1994). While, Rwanda will likely prosecute those responsible for the atrocities outside the jurisdiction of the Tribunal, the legitimacy of the Tribunal as representing the victims of the genocide is questionable. *See* Ambassador Manzi Bakuramutsa, *Identifying and Prosecuting War Criminal: Two Case Studies – the Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 646 (1995) (former Rwanda Ambassador to the UN).

[432] *See* Miguel Caballos, *It is Ultimately up to Ordinary Colombians to Bring Change to Colombia* , Special Report, CNN.com (n.d.) (discussing need for continued citizen involvement in resolving internal armed conflict), *at http://www.cnn.com/SPECIALS/2000/colombia.noframes/story/essays/ceballos/.*

[433] *See* Maria Cristina Caballero, *A Journalist's Mission in Colombia: Reporting Atrocities is Not Enough*, Special Report, CNN.com (n.d.) (discussing need of all parties to the conflict to work together as well as citizens and international observers), *at* http://www.cnn.com/SPECIALS/2000/colombia.noframes/story/essays/caballero/.

general interests of the international community; however, it risks disenfranchising the very victims and communities it is judging.[434]

For example, in establishing the Rwanda tribunal, no death penalty was authorized as a sanction.[435] In Rwanda, however, the death penalty is accepted as a sanction. Whatever one's position is on this controversial subject, having that position paternalistically dictated by outside interests serves only to reduce any credibility in the tribunal.[436] The community does not get justice, but instead gets an international criminal tribunal that applies someone else's standards.[437] It appears that the international criminal tribunal for Sierra Leone will make this same mistake.[438]

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[434] *But see Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, para. 7, U.N. Doc. S/2000/915 (Oct. 4, 2000) (discussing overcoming this illegitimacy through an extensive information campaign to convince local citizens of the value of the tribunal).

[435] *See* Statute for International Criminal Tribunal for Rwanda, S.C. Res 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1602 (1994). Interestingly, a majority of countries retain the death penalty for the most serious offenses. *See Question of the Death Penalty: Report of the Secretary-General submitted pursuant to the Commission Resolution 1999/8, reprinted in* UN Doc. E/CN.4/1999/52.

[436] *See* William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solution to Impossible Problems*, 7 CRIM. L.F. 523, 553 (1996) (discussing the effect of exclusion of the death penalty on Rwanda's support for the Tribunal).

[437] *See* Ambassador Manzi Bakuramutsa, *Identifying and Prosecuting War Criminal: Two Case Studies – the Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 646 (1995) (stating the difference in treatment between Rwanda courts and the International Tribunal was "not conducive to national reconciliation in Rwanda").

[438] *See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, annex, U.N. Doc. S/2000/915 (Oct. 4, 2000) (discussing that extensive persuasion will be needed to convince local citizens that despite the lack of capital punishment the international criminal tribunal is not acquitting the accused but imposing a more humane punishment).

The key is that domestic tribunals remain tied to the community over whose subjects they exercise power.[439] International criminal tribunals risk not representing the community over which they exercise their authority.[440] This unique form of judicial tyranny in the pursuit of justice seems at odds with the ideals of human rights. While the Law of Internal Armed Conflict must recognize certain fundamental standards exist across borders, it must also recognize that each community applies these standards in accordance with their community norms.[441]

4. Value of International Tribunals as Secondary Mechanisms

To the extent that international tribunals are effective, they should be supported.[442] Their continued role or threat may help ensure the application of

[439] While some may see this as a weakness, even the independent judiciary of the United States is balanced by the separate legislative and executive powers. *See* U.S. CONST. arts. I, II, III.

[440] *See* Michael F. Lohr & William K. Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. LEG. STUD. 33, 48 (1999). "Despite the ICC treaty's incorporation of several internal checks and balances, [it] does not answer to any executive authority [nor] is it subject to balances provided by a separate legislature." *Id.*

[441] *See Aide-memoire on the Report of the United Nations Group of Experts for Cambodia of 18 February 1999*, issued by the Government of Cambodia, U.N. Doc. A/53/875, S/1999/324 (Mar. 12, 1999). "The national judiciary system will undertake the investigation, prosecution and trial of Ta Mok, the culprit, under the Cambodian law in force. . . . [T]he culprit is a Cambodian national, the victims are Cambodians, the place of the commission of the crimes is also in Cambodia; therefore the trial by a Cambodian court is fully in conformity with this legal process.". *Id.*

[442] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321 (2000) (concluding that the Yugoslavia and Rwanda tribunals failed because they do not have enough power); Mark W. Janis, *International Courts and the Legacy of Nuremberg: The Utility of International Criminal Courts*, 12 CONN. J. INT'L. L. 161 (1997) (concluding that to date international criminal tribunals have been largely ineffective).

fundamental standards.[443] In effect, serving as a continuing reminder that accountability will be had, if not domestically, then internationally.[444] States, however, must be primarily responsible for violations of their obligations under international law.[445] For the international community, this means ensuring state authority and capacity for domestic enforcement. Domestic enforcement of the Law of Internal Armed Conflict will maximize humanitarian interests by maximizing compliance.

Perhaps the role of international tribunals is best exemplified in the principle of complementarity contained in the Rome Statute.[446] When no state is willing or able to prosecute, an international tribunal could fill this role. In addition, in the case where a state prosecution is a sham used to shield violations, an international tribunal may serve

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[443] *See* RESTATEMENT (THIRD), *supra* note 20, § 701 (discussing state obligation to respect Human Rights embodied by custom, treaty and general principles of law). *See also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 171-82 (1989) (discussing the continued existence of the exhaustion of local remedies requirement in human rights and humanitarian law). No matter how few cases these international tribunals try, their existence does send a powerful message; the international community will get involved if the Law of Internal Armed Conflict is ignored. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (discussing the state fear of the activities of these tribunals as spurring domestic prosecutions). More importantly, a state can be liable for failure to take steps to punish a violation of fundamental rights. *See* RESTATEMENT (THIRD), *supra* note 20, § 703 (remedies for violations).

[444] *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 27 (2001) (discussing the possibility of international criminal tribunals as making it increasingly difficult for states to avoid their own obligations to impose accountability).

[445] *See* RESTATEMENT (THIRD), *supra* note 20, § 206 (discussing capacity, rights and duties of states as including pursuing and being subject to legal remedies). *See also* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 563 (1995) (discussing that the development of international norms should not obviate the responsibility of the states to prosecute those norms).

[446] *See* Micheal A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 25 (2001) ("The [International Criminal Court] can fulfill an important function in buttressing domestic justice by serving as an additional forum for dispensing justice when domestic forums are inadequate."). The focus on the domestic judiciary and the responsibility of the state should remain paramount.

as an alternative forum.[447] The difficulty lies in maintaining the presumptive reliance on domestic forums over international forums. In the face of the increasing willingness of international bodies to govern domestic matters, this reliance may be easily dismissed.[448]

C. Importance of Domestic Enforcement

Domestic enforcement of the Law of Internal Armed Conflict re-emphasizes that government or insurgency power ultimately relies on the people. International criminal tribunals reflect an international determination that the state has lost the power to govern, whether through atrocities or other actions, and that an international judicial order must be imposed.[449] This new international judicial order, however, suffers from three fundamental defects. First, it can be politicized.[450] Second it may add to the chaos of the internal armed conflict.[451] Finally, it fails to represent the people upon which it is

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[447] *See* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 424 (1998) (discussing the idea of primacy of national courts over the international criminal court).

[448] *See infra* note 376 and accompanying text regarding the increasing willingness of international bodies to examine domestic conduct.

[449] *See The International Criminal Court, Setting the Record Straight*, *at* http://www.un.org/News/facts/iccfact.htm (last modified June 1, 1999) (discussing why an international criminal tribunal is needed).

[450] *Compare id.* (international criminal court will avoid politicization because it needs permission from itself to start an investigation), *with* Michael F. Lohr & William K. Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 USAFA J. LEG. STUD. 33, 48 (1999) ("Despite the ICC treaty's incorporation of several internal checks and balances, [it] does not answer to any executive authority [nor] is it subject to balances provided by a separate legislature."), *and* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (expressing concern about "the selectivity involved in a system where the establishment of a tribunal for a given conflict depends on whether consensus to apply Chapter VII of the U.N. Charter can be obtained").

[451] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321 (2000) (although concluding that international criminal tribunals are necessary, the commentator recognizes that the first priority should be bringing an end to the war, and then

imposing order.[452] The farther removed the judiciary, albeit domestic or international, is from the source of the power-the people-the less effectively that organization will be in accomplishing those judicial functions.[453] To that end, a renewed emphasis on domestic enforcement of the Law of Internal Armed Conflict is needed to reverse the neo-judicial colonialist trend.

This part explores the idea of re-invigorating the principle of sovereignty. Domestic judicial enforcement of the Law of Internal Armed Conflict as a means of re-instituting or establishing a credible rule of law in the chaotic situation of an internal armed conflict is then explored. Finally, the collateral effect on state and non-state actors is briefly discussed.

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begin imposing justice). It appears that the on-going tribunals have done little to stop Balkan or central African violence. *See Macedonia Seizes All 'Key Points,'* CNN.com/World, Mar. 25, 2001, *at* http://www.cnn.com/2001/WORLD/ europe/03/25/macedonia.04/index.html (discussing spreading violence out of Kosovo); *Mass Graves Found in Burundi*, CNN.com/World, Mar. 25, 2001, *at http://www.cnn.com/2001/WORLD/africa/03/25/ burundi.Bodies /index.html* (discussing continuing violence between Hutu and Tutsis tribes).

[452] *See* Ambassador Manzi Bakuramutsa, *Identifying and Prosecuting War Criminal: Two Case Studies – the Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 646 (1995) (stating the difference in treatment between Rwanda courts and the International Tribunal was "not conducive to national reconciliation in Rwanda").

[453] *But see* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321 (2000) (concluding that these difficulties can be overcome by giving international criminal tribunals more power such as police forces, prison systems). Not discussed by commentators, is the impact of this imperialistic imposition of a complete social order on a society.

1. Effect of Re-invigorating the Sovereignty of the State

The doctrine of sovereign equality is the modern cornerstone of the international legal order.[454] Sovereignty is a state's ability to manage its own affairs independent of external interference or intervention.[455] This territorial inviolability is reflected in the right of the state to conduct its domestic affairs as it sees fit. Any new international legal regime must recognize this right of each community to govern itself.

"In order for the people to govern and to continue to develop their capacity to govern they must have the power to govern and the necessity to govern as close to them as it is practical to place it, and there must be provided for their use governmental machinery adapted to the exercise of these functions by the people."[456] Even supporters of international criminal tribunals agree that sovereignty serves not only to protect a state's independence, but also contributes to the state's ability to provide security and protection for its own citizens.[457] In the wake of internal atrocities, however, it is easier

[454] *See* U.N. CHARTER art. 2(7). Member states agree to not become involved in other member states domestic affairs. *Id.*

[455] *See* Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 417-18 (1991).

[456] Rep. Hatton W. Sumners, Address Before U.S. House of Representatives (Feb. 1, 1940), *reprinted in* HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 751 (Sol Bloom ed., 1941) (discussing governmental progress in a democracy).

[457] *See* Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 EMORY INT'L L. REV. 213, 259 (2000) (arguing that the US opposition to the ICC is based on disingenuous notions of sovereignty, but recognizing the values that sovereignty provides).

to emphasize the international responsibility for prosecution of fundamental norms.[458] It is harder, yet more important to demand this responsibility of the state.[459]

An example of this restoring the responsibility to the state is the international response in East Timor. Despite an almost complete evisceration of the local judiciary, the international community was able to assist in rebuilding a domestic judiciary with local judges, prosecutors, and tribunals.[460] Similarly, in Kosovo the international community was able to overcome Herculean challenges and assist in restoring a local judiciary.[461] So even though individual states or parties may find short-term advantages in violating the law in particular situations, it must be remembered that their long-term interests will not be served by the system.[462]

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[458] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321, 324-328 (2000) (discussing the failure of the international community to respond to various atrocities throughout the world).

[459] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (reminding that "national courts cannot be ignored."). *See also* Rep. Hatton W. Sumners, Address Before U.S. House of Representatives (Feb. 1, 1940), *reprinted in* HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 751 (Sol Bloom ed., 1941) (noting that the freedom enjoyed by the state is not so that it may merely enjoy the blessings of this freedom, but rather that the state may discharge the duties incident to freedom and gain strength by its discharge).

[460] Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 51-53 (2001).

[461] *Id.*

[462] Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 532-33 (1993); HENRY MANNING, THE NATURE OF INTERNATIONAL SOCIETY 106-07 (1962). In response to advocates for swift justice, the author draw attention to the paucity of completed cases for the current international criminal tribunals despite over twelve years of combined operations. All the concluded trials, except for the case of Mr. Erdemovic, are still on appeal. For an updated list of persons indicted by the Yugoslavia Tribunal, see http://www.un.org/icty/BLS/ind.htm (last visited Mar. 25, 2001). For an updated list of persons indicted by the Rwanda Tribunal, see http://www.ictr.org /indictments.html (last visited Mar. 25, 2001). In addition, attention is also drawn to the situations in Argentina, Chile and Croatia where the perpetrators of atrocities of those regimes are now being called to justice, domestically. *See* Anthony Faiola, *Argentine Amnesty Overturned*, WASH. POST, Mar. 7, 2001, at A19 (ruling by Argentine court allows prosecutions for activities during "dirty war"); Pascale Bonnefoy, *Pinochet charges are reduced; Appeals court orders trial as accessory, not mastermind*, WASH. POST, Mar. 9, 2001, at A20 (ruling by court upholding the indictment

Any state is simply the central structured social organization meant to bring about the comprehensive coordination of individual energies.[463] As the central organization, it represents the ultimate authority and responsibility over that social structure. The state gains strength by fulfilling its responsibilities, but when relieved of responsibilities, which are within its governmental capacity, then the power to do the things of which it has been relieved departs from the state.[464] If the goal of a stable international system is states that apply and live by a rule of law, then the states must have the power, strength and capacity to fulfill that responsibility. The international community can focus its efforts on ensuring that the state exercises that responsibility, to bring order out of the chaos of internal armed conflict.

Reducing state sovereignty, however, decreases the legitimacy of the state. As states recognize this loss of sovereignty and legitimacy that occur with the imposition of these judicial institutions, the states are less likely to support these institutions.[465] Under

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of General Augusto Pinochet for human rights abuses committed shortly after his 1973 coup, but reducing the charges from masterminding the murder and kidnapping of dissidents to acting as an accessory in covering up the crimes); *War crimes suspect detained,* CNN.com/World, Feb. 21, 2001, (discussing arrest of Croatian General Mirko Norac for role in 1991 killing of Serb civilians), *available at* http://www.cnn.com/2001/WORLD/europe/02/21/ croatia.general/index.html.

[463] *See* GERHART NIEMEYER, LAW WITHOUT FORCE, THE FUNCTION OF POLITICS IN INTERNATIONAL LAW 313 (1941).

[464] Rep. Hatton W. Sumners, Address Before U.S. House of Representatives (Feb. 1, 1940), *reprinted in* HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 751 (Sol Bloom ed., 1941).

[465] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321, 363-64 (2000) (concluding that the failure of the current international criminal tribunals is because of the dependence on the "vacillating interests of nation-states" and "the acquiescence of powerful nations."). To not rely on the acquiescence of the nation state as the representative of its citizens may be trading justice for tyranny. *See also supra* note 353 (discussing whether the role of the U.N. includes becoming a supra-government).

the Law of War, the parties originally envisioned a scheme that relied first on the parties in the conflict to provide enforcement of violations.[466] Similarly Human Rights regimes and other "[i]nternational conventions that proscribe certain activities of international concern without creating international tribunals to try the violators characteristically obligate the states to prohibit those activities and to punish the natural and legal persons under their jurisdiction for violations according to national law."[467] Even the current structure of the International Criminal Court attempts to recognize this concern through its principle of "complementarity."[468] Similarly the Law of Internal Armed Conflict must recognize the importance of re-invigorating the sovereignty of the state.

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[466] *See* Geneva Convention I, *supra* note 42, art. 49; Geneva Convention II, *supra* note 42, art. 50; Geneva Convention III, *supra* note 42, art. 129; Geneva Convention IV, *supra* note 42 art. 146 (each article discussing that "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts."). For an example of this scheme in practice, see GEORGE S. PRUH, LAW AT WAR: VIETNAM, 1964-1973, at 154 (1975) (discussing U.S. war crimes prosecutions during the Vietnam conflict). For the United States policy, see DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10, para 506c ("Grave Breaches...are tried and punished by United States tribunals as violations of international law"), para 506d ("grave breaches are, if committed within the United States, violations of domestic law over which the civil courts can exercise jurisdiction."). State sovereignty should not be reduced, but rather encouraged with domestic tribunal having primacy in prosecuting violators of the Law of Internal Armed Conflict. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 253 (2000) (discussing historic implementation of the Law of War by relying on domestic tribunals).

[467] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 562-63 (1995) (citing as an example the Convention on the Prohibition of the Development of Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, Art. VII, *reprinted in* 32 I.L.M. 800, 810 (1993)). "When treaties fail to clearly define the criminality of prohibited act, the underlying assumption has been that customary law and internal penal law would supply the missing links" *Id.*. *See* International Covenant on Civil and Political Rights, *supra* note 134, art. 2(3) (creating the obligation of domestic implementation); American Convention on Human Rights, *supra* note 134, art. 2 (requiring states to provide implementation under national laws); European Convention for the Protection of Human Rights, *supra* note 134, art. 13 (requiring remedies before national authority).

[468] *See Rome Statute, supra* note 216, pmbl, para. 10 ("the [ICC] established under this Statute shall be complementary to national criminal jurisdictions."). *See also* Micheal A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 25 (2001); Gregory P. Noone & Douglas W. Moore, *An Introduction to the International Criminal Court*, 46 NAV. L. REV. 112, 140-42 (1999) (both discussing principle of complementarity and its implementation).

Finally, although the Law of Internal Armed Conflict is not based on reciprocity, experience, in both inter-state and internal conflicts, suggests that enforcement of the Law of Internal Armed Conflict may depend on reciprocity and fear of reprisals.[469] One party to the conflict may apply the law for fear of the consequences for its own forces if it does not. When there is no reasonable prospect of one side applying the law, whether from a lack of a particular resource, an unwillingness to apply the law, just plain ignorance, or that the responsibility has been removed to the international level, the other side may feel less inclined to be inhibited. Working with state and non-state parties to the conflict to educate their fighters on fundamental standards, rather than relying on international criminal tribunals, can serve humanitarian interests. It may increase the pressure on the parties to respect their obligations and enhance the likelihood of some form of reciprocity however limited.[470]

In the wake of internal atrocities it is easy to demand justice and look to international institutions for prosecution of fundamental norms.[471] It is more important to

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[469] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 247-51 (2000) (discussing the origin of the principles of reciprocity and reprisal).

[470] Hampson, *supra* note 89, at 69-71 (discussing role of International Committee of the Red Cross in this process).

[471] *See* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321, 324-28 (2000) (discussing the need to respond to atrocities throughout the world by creating stronger and more powerful international tribunals); Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?* 14 EMORY INT'L L. REV. 213 (2000) (arguing in support of establishing international criminal court to deal with atrocities).

demand this responsibility of the state.[472] Reinvigorating state sovereignty can serve humanitarian interests by demanding accountability of the state.[473]

2. Empowering National Tribunals

The rule of law may be in its greatest jeopardy during or after an internal armed conflict.[474] Empowering national tribunals to enforce the Law of Internal Armed Conflict may serve to introduce, reinforcing or reinvigorating the rule of law on the local level.[475] The application of fundamental standards results in greater credibility for the domestic court, and consequently, greater likelihood of effectiveness of any judgment. The challenge lies in ensuring the correct application of these standards.

International criminal tribunals resolve this dilemma by removing domestic interests from the process.[476] International observers, however, would be able to resolve

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[472] *See* Theodor Meron, *War Crimes Law Comes of Age,* 92 AM. J. INT'L L. 462, 468 (1998) (discussing the continuing universal criminalization of the Law of War and serious violations of Human Rights as serving to stimulate national prosecutions).

[473] "Moreover, the evolution of individual criminal responsibility must not erode the vital concepts of state responsibility for the violation of international norms." Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995).

[474] *See Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, para. 34, U.N. Doc.S/2000/1055 (Oct. 31, 2000) (discussing steps needed to develop respect for the rule of law).

[475] *See* Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 65 (2001) (discussing the important role of local forum in postconflict transitions).

[476] *See* Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 456 (1999) (suggesting that these tribunals may actually provide political cover for states to avoid prosecuting war criminals by passing the responsibility to the tribunal).

this issue and reinforce the rule of law during a critical time by reintroducing domestic tribunals to the process.[477] This idea of shared responsibility between domestic tribunals and international observers is not revolutionary.[478] Already, most Law of Internal Armed Conflict violations are within the jurisdiction of domestic civilian criminal courts and military courts-martial.[479] The incorporation of fundamental standards embodied by the Law of Internal Armed Conflict into domestic legislation has been the subject of recommendations by U.N. human rights rapporteurs.[480] The fact that trials are the subject of national instead of international tribunals concerns procedure rather than a fundamental principle of justice.[481] As either can serve justice, it is better to select a system that can directly embody the community it is judging.

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[477] The Cambodian government has proposed this method. *See Letter from the Prime Minister of Cambodia to the Secretary-General*, UN Doc A/53/866, S/1999/295 (Mar. 24 1999) ("To ensure that the [Khmer Rouge] trial by the existing national tribunal of Cambodia meets international standards, the Royal Government of Cambodia welcomes assistance in terms of legal experts from foreign countries.").

[478] Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481, 502 (1998). The United Nations bodies and the International Committee of the Red Cross do "not have sole responsibility for monitoring compliance with humanitarian law during armed conflicts. That responsibility is shared with national tribunals, and with international tribunals, when such tribunals have been established." *Id.*

[479] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 564-65 (1995) (discussing the various national military manuals or laws dealing with Law of War violations, specifically Common Article 3). *See, e.g.*, FED. REP. GERMANY, HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL, para. 1209 (1992); CANADIAN FORCES, LAW OF ARMED CONFLICT MANUAL (Second Draft) at 18-5, 18-6 (undated); UK WAR OFFICE, LAW OF WAR ON LAND, AND BEING PART III OF THE MANUAL OF MILITARY LAW para. 626 (1958); DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10, para. 505d (1956) (each discussing jurisdiction over Law of War violations).

[480] In 1997, the U.N. Special Rapporteur on Torture concluded "that both the Geneva Conventions and the Convention Against Torture obliged state parties to extradite or prosecute torturers found within their jurisdiction ... He urged all States to review their legislation to ensure that their courts had jurisdiction over war crimes and crimes against humanity." Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481, 496 (1998) (citing U.N. Doc. E/CN.4/1998/38, paras. 230-32).

[481] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 566 (1995) (discussing that applying international fundamental standards whether at the international or domestic level does not result in *ex post facto* problems).

It might be suggested that international criminal tribunals offer swift and sure justice at the modest price of state sovereignty.[482] Regretfully, this is not the case. For example, the Rwanda tribunal established in 1995 has so far handed down only seven judgments in its six years, all of which are on appeal.[483] Whereas, the domestic tribunals in Rwanda have completed thousands of trials for conduct arising out of its internal armed conflict.[484]

Similarly, the President of the Yugoslavia Tribunal recently reported that at a cost of $100 million annually, the temporary Tribunal's mission might be accomplished by 2016, more than 20 years after its establishment.[485] It is fair to ask what the effect of putting $100 million a year into a domestic judiciary for the next fifteen years may have on the long-term effectiveness of that domestic judiciary. Although serving as examples of independent judiciaries, when the international criminal tribunals eventually complete their tasks, these states will no longer have the benefit of these judiciaries. Perhaps a

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[482] Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 EMORY INT'L L. REV. 213 (2000) (author arguing that the International Criminal Court offers the hope of justice and an end to impunity).

[483] For an updated list of persons indicted by the Rwanda Tribunal, see http://www.ictr.org/indictments.html (last visited Mar. 25, 2001). The current international criminal tribunals have only completed one case despite over twelve years of combined operation. All the concluded trials, except for the case of Mr. Erdemovic, are still on appeal. For an updated list of persons indicted by the Yugoslavia Tribunal, see http://www.un.org /icty/BLS/ind.htm, (last visited Mar. 25, 2001).

[484] *See Death Penalty for Trio Found Guilty of Rwanda Killings*, CNN.com/World, Feb. 4, 1999, *at* http://www.cnn.com/world/africa/9902/04/rwanda.01/index.html.

[485] "Almost a thousand people are now employed at the [Yugoslavia] Tribunal and its annual budget has risen to over 100 million dollars." Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, Address Before the U.N. General Assembly, (Nov. 20, 2000), *available at* http://www.un.org/icty/pressreal/p540-e.htm.

better long-term commitment to justice and humanitarian ideals resides in developing permanent domestic tribunals.

The enforcement of the Law of Internal Armed Conflicts cannot solely depend on international tribunals. "They will never be a substitute for national courts. National systems of justice have a vital, indeed, the principal, role to play here."[486] This assumption of primacy of domestic tribunals over domestic affairs is embodied throughout international law.[487] Similarly, the Law of War and Human Rights regimes have always operated on the assumption that their rules would be domestically enforced.[488] "The fact that international rules are normally enforced by national institutions and national courts applying municipal law does not in any way diminish the status of the violations as international crimes."[489]

The need for a renewed emphasis on domestic solutions to these problems is apparent. If the same time, money and effort is allocated to establishing strong coherent

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[486] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (concluding that the function of the national courts cannot be ignored because of the uncertainties surrounding the International Criminal Court, doubts about additional ad hoc international criminal tribunals being established and the recognition that any international criminal tribunal will be complementary to national justice systems). *See also* Jonathan I. Charney, *Progress in International Law?*, 93 AM. J. INT'L L. 452, 453 (1999) (recognizing that aggressive international criminal prosecutions of these international crimes are easy to support, but also present difficult conflicts between legal, political and national reconciliation efforts).

[487] *See* RESTATEMENT (THIRD), *supra* note 20, §§ 401, 403 (discussing limitations on jurisdiction over other states); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 171-82 (1989) (discussing exhaustion of domestic remedies).

[488] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 253 (2000) (discussing the traditionally domestic implementation of the Law of War).

[489] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 563 (1995) (reminding that the development of international norms must not erode the concept of state responsibility).

domestic tribunals, perhaps a long-term commitment to humanitarian ideals and the rule of law by the very people of the state could be made. By relying on international criminal tribunals to do the work, this long-term commitment to the course of humanitarian progress is forsaken.

3. Collateral Benefits of Domestic Enforcement

Empowering domestic tribunals with the primary responsibility of enforcing the Law of Internal Armed Conflict may have collateral benefits beyond maximizing humanitarian interests and reinforcing the rule of the law. Violation of the Law of Internal Armed Conflict by the government or the insurgents serves to de-legitimize their authority and international credibility.[490] This possibility of international de-legitimization may result in the parties seeking greater compliance themselves.[491] Compliance serves to strengthen the international and domestic legitimacy of the party. Parties can use the adherence to the Law of Internal Armed Conflict as a tool of legitimizing their operations.[492] Continued violation may result in the insurgency or the

[490] *See* Karen DeYoung, *Pastrana Urges U.S. to Meet with Guerillas*, WASH. POST, Feb. 27, 2001, at A20 (U.S. had begun dialogue with Colombian rebels, but ended it in March 1999 after rebels killed three American humanitarian workers.).

[491] *See id.* ("Although the FARC acknowledged responsibility for what it called a 'mistake of war,' and announced that it would punish several low-level guerillas, the United States said there would be no more talks until those responsible for ordering and committing the killings are turned in."). *See also* Scott Wilson, *Colombian General Convicted in Killings*, WASH. POST, Feb. 14, 2001, at A19 (reporting the convictions of a Colombian general officer and a colonel for allowing illegal paramilitary groups to massacre civilians following the receipt of funds under the Colombian government's foreign policy initiative, Plan Colombia).

[492] *See, e.g.*, Maria Cristina Caballero, *A Journalist's mission in Colombia: Reporting atrocities is not enough,* Special Report, CNN.com (n.d.) (interview with head of Colombian paramilitaries, Carlos Castano

government losing the credibility it needs to further its political agenda.[493] In effect, both parties become interested in being viewed as more fair than the other party in trying to gain consensus from the people to govern.[494]

"Nations derive their legitimacy from the consent of those they govern, and lose that legitimacy when they oppress their people."[495] This legitimacy can come from properly exercising state functions through domestic enforcement of fundamental norms. Similarly, parties opposed to the state can find the legitimacy through compliance.[496] A military or insurgency force that self regulates or is sanctioned by its judiciary may seek reform to gain this legitimacy. State legislators or insurgent politicians can also gain

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who denies "being a monster and rejected allegations he had committed massacres."), *at* http://www.cnn .com/SPECIALS/2000/colombia.noframes/story/essays /caballero/.

[493] *See* Laura Garces, *The Dynamics of Violence*, Special Report, CNN.com (n.d.) (Colombian President "Pastrana has been successful in restoring Colombia's credibility abroad and in garnering financial assistance, both from the United States and from Europe."), *at* http://www.cnn.com/SPECIALS /2000/colombia.noframes/story/essays/garces/ia.noframes/story/essays/garces/; Sibylla Brodzinsky *Viciousness of extortion shocks Colombians Slaying leads to suspension of peace talks*, USA TODAY, May 18, 2000, at A1 (reporting that outrage over the gruesome murder of a local farmer sparked an unprecedented outcry against leftist rebels and their widespread extortion practices and prompted the suspension of peace talks with guerillas).

[494] *See* Scott Wilson, *Colombia's Other Army*, WASH. POST, Mar. 12, 2001, at A1 (discussing the growing paramilitary ranks "not only from beleaguered peasants seeking protection [from the insurgents], but also from an exhausted middle class that has watched a once-powerful economy savage by guerillas."); Maria Cristina Caballero, *A Journalist's mission in Colombia: Reporting atrocities is not enough,* Special Report, CNN.com (n.d.) (interview with head of Colombian paramilitary group, Carlos Castano who is trying to recast his image as "only protecting Colombians from guerillas"), *at* http://www.cnn.com/SPECIALS /2000/colombia.noframes/story/essays /caballero/.

[495] Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address Before the United Nations Security Council (Jan. 20, 2000), *available at* http://www.senate.gov /~foreign/2000/ pr012000.html.

[496] The Law of Internal Armed Conflict does not provide combatant immunity or legal status to any parties of the conflict; rather it established basic standards of conduct. *See supra* note 96 and accompanying text (discussing combatant immunity and the effect on legal status). Adherence to these standards, however, can provide legitimacy.

political power by embracing humanitarian norms and compliance.[497] State investigative organs can develop respect and responsibility by investigating violations by all parties. In addition, media and citizen groups are more likely to stay involved and participate in the development of standards.[498] Domestic enforcement of the Law of Internal Armed Conflict can rebuild and reunite the torn society.

In sum, domestic enforcement of the Law of Internal Armed Conflict has effects that cannot be achieved through international mechanisms. It can serve to reinvigorate the sovereignty of the state and reduce the chaos of internal armed conflict. It can also begin the process of establishing the rule of law through domestic tribunals. Finally, compliance with the Law of Internal Armed Conflict can serve all parties to the conflict.

D. Conclusion

Critics of domestic enforcement of the Law of Internal Armed Conflict often cite the paucity of domestic prosecution of violations.[499] To be sure, the record of domestic prosecutions of government and dissident violators of such international norms as

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[497] *See Milosevic Remanded in Custody*, CNN.com/World, April 2, 2001, *at* http://www.cnn.com/2001/WORLD/europe/04/01/milosevic.evidence/index.html (reporting Serbian President Kostunica stating that "No one can remain untouchable. Every individual must bear responsibility according to the law. Whoever shoots at the police must be apprehended. Whoever has been subpoenaed by a judge must answer those summons. The law applies to every citizen").

[498] *See* Miguel Ceballos, *It is ultimately up to ordinary Colombians to bring change to Colombia*, Special Report, CNN.com (2000) (discussing the active role Colombians need to take in resolving the internal armed conflict), *at* http://www.cnn.com/SPECIALS/2000/colombia.noframes/story essays/ceballos/.

[499] Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L. L. REV. 321, 342 (2000) ("[I]t is the very failure observed at Leipzig that precludes domestic enforcement for violations that have been increasingly characterized as international crimes.").

embodied by the Law of Internal Armed Conflict is disappointing.[500] But the growing criminalization of these norms should not lead to relieving states of their responsibilities.

This desire for justice through international criminal tribunals overlooks the inherent weaknesses of international criminal tribunals. First international criminal tribunals are subject to political machinations. In addition, international criminal tribunals add greater uncertainty to a chaotic situation as sovereignty is split between the international criminal tribunal and the remainder of the state. Also the credibility of international criminal tribunals' judgments are questionable when these judgments do not represent the community they are serving and occur at a rate of one every twelve years.

Although, it is often difficult to accept a regime's prosecutorial decisions, continued emphasis and pressure on national prosecutors to rely on fundamental standards embodied by the Law of Internal Armed Conflict can be successful.[501] State sovereignty must be reinforced so that "the evolution of individual criminal responsibility [does] not erode the vital concepts of state responsibility for the violation of international norms."[502] It also must be remembered that diminishing the independent governmental

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[500] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 556 (1995).

[501] *See* Scott Wilson, *Colombian General Convicted in Killings*, WASH. POST, Feb. 14, 2001, at A19 (reporting the convictions of a Colombian general officer and a colonel for allowing illegal paramilitary groups to massacre civilians following the receipt of funds under the Colombian government's foreign policy initiative, Plan Colombia.); *Pinochet Murder Hearing Starts*, USA TODAY, Dec. 7, 2000, (reporting on domestic court hearings against former Chilean President), *at* http://www.usatoday.com/news /world/nwsthu13.htm.

[502] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 563 (1995). State-sponsored violations as well as non-state-sponsored violations should be the responsibility of the state as the sovereignty.

responsibility of a state destroys the possibility of the creation, preservation, or institution of democracy.[503] In addition, the enforcement of the Law of Internal Armed Conflict by domestic tribunals will go farther in creating an independent judiciary and respect for the rule of law, than an international criminal tribunal that was created out of the political consensus of allegedly disinterested states, and which eventually will leave a judicial vacuum when its mission is complete.[504] Finally, emphasis on domestic enforcement of these norms forces responsibility on the parties seeking international and domestic legitimacy. In sum, an international commitment to the domestic enforcement of this new legal regime will capitalize on humanitarian interests by maximizing compliance with the law during an internal armed conflict.

VI. Closing Thoughts

Experience suggests that it is in internal armed conflicts or civil wars that some of the most flagrant violations of the Law of War and of Human Rights occur. This does not arise from a legal vacuum. Customarily and conventionally, the Law of War, Human Rights obligations and various treaties governing methods and means of war continue to remain applicable. The confluence between these legal rules in an internal armed conflict

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[503] Rep. Hatton W. Sumners, Address Before U.S. House of Representatives (Feb. 1, 1940), *reprinted in* HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 751 (Sol Bloom ed., 1941). *But see* Burgos, *supra* note 85, at 3 ("The very existence of a large number of political detainees whose rights to procedural due process have been denied indicates the fallacy in relying upon national law to protect political prisoners.").

[504] *See supra* notes 435, 476 and accompanying text (respectively discussing the problems suffered by the Rwanda Tribunal and re-establishing the rule of law through domestic tribunals).

has given rise to a new international legal regime, the Law of Internal Armed Conflict. The Law of Internal Armed Conflict does not provide combatant immunity or legal status to any party of the conflict; rather it establishes basic standards of conduct.[505]

The criminalization of the norms underlying this regime is increasing. An effective enforcement system remains key, however, to the success of the Law of Internal Armed Conflict. This enforcement system must be structured to balance many interests. It must balance the victim's interest in justice, the interest of the accused in an impartial hearing, the international interest in humanity, and the interest of states in representing their communities. The recent ad hoc international criminal tribunals in Yugoslavia and Rwanda, and now the possible implementation of the International Criminal Court, have encouraged greater reliance on international mechanisms to balance these interests. While laudatory, a more effective mechanism is available, domestic tribunals. Domestic tribunals using universal standards can best balance these various interests.

National court systems should be the primary enforcement mechanism of the Law of Internal Armed Conflicts. "From the perspective of impact on the individual, the most important means of implementing international law is through the national legislation, courts, and administrative agencies."[506] The norms embodied by the Law of Internal Armed Conflict represent the international interest in ensuring justice. In addition, enforcement by domestic tribunals stabilizes the international system through respect for

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[505] *See supra* note 96 and accompanying text (discussing combatant immunity and effect on legal status).

[506] *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 21 (1996).

state sovereignty. By requiring the state to accept the responsibility of enforcement of the Law of Internal Armed Conflicts, the law stabilizes the situation and allows the process of rebuilding the fractured state to occur.

Critics of domestic tribunals continue to overlook the domestic tribunal's importance in furthering democratic ideals by keeping the power of governing nearest the people. International mechanisms should be warily used because of the inherent colonialism of enforcement of these norms outside the domestic political process. Rather the emphasis should be on supporting, educating and requiring domestic enforcement of the Law of Internal Armed Conflict.

It is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[507]

[507] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).